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NOMINATION OF ANTHONY M. KENNEDY TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

FEBRUARY 1, 1988.—Ordered to be printed

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NOMINATION OF ANTHONY M. KENNEDY TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

FEBRUARY 1, 1988.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

The Committee on the Judiciary, to which was referred the nomination of Judge Anthony M. Kennedy to be an Associate Justice of the United States Supreme Court, having considered the same reports favorably thereon, a quorum being present, by a vote of 14 yeas and 0 nays, with the recommendation that the nomination be approved.

INTRODUCTION

The appointment of a Justice to the United States Supreme Court celebrates the particular genius of our Constitution. Two branches of Government share in the power to determine the membership of the third branch, which then explicates the authority of the other two, the relationship between the National Government and the States, and the rights and liberties of all Americans.

To fulfill the appointment function, both the President and the Senate must respect each other's constitutional role in the process while remaining true to their own. In selecting a nominee, the President should consider the prevailing views of the Senate and the American people while upholding the sole authority to choose a nominee for the Court. The Senate should refrain from, in effect, dictating a particular choice to the President while asserting its right to weigh the nominee's constitutional and judicial philosophy in its exercise of advice and consent. In the committee's view, the nomination of Judge Anthony M. Kennedy to be an Associate Jus-

tice of the Supreme Court reflects a desirable balance between the roles of the President and the Senate.

There is reason to believe that the choice of this nominee will assure continuity on the Supreme Court at this moment of historical transition. Judge Kennedy seems to possess the truly judicious qualities that Justice Lewis Powell embodied. In its assessment of Judge Kennedy, the committee found that he is open-minded, fair and independent. Judge Kennedy's speeches and testimony show a nondoctrinaire but firm commitment to interpret the Constitution as an evolving charter of government and liberty, a document that Justice Harlan called "a living thing."

Furthermore, the nominee's record, particularly his testimony, bears witness to his practice of true judicial restraint: his great respect for the law as a social institution and for our history of judicial interpretation that forms the precedents of Supreme Courts from John Jay to William Rehnquist. In her analysis of Judge Kennedy, Susan Westerberg Praeger, dean of the University of California (Los Angeles) Law School, put it well when she said that he is "a person who will listen, who has the capacity to be compassionate and who recognizes that his decisions affect people, not pieces of paper or theories or principles." (Written statement of Susan Westerberg Praeger, at 1.)

This report canvasses the record of significant issues that were developed at the committee hearings. All Senators subscribing to this report concur that each of these issues was relevant to some members of this committee in reaching the recommendation that the Senate consent to this nomination. Individual Senators may not agree, however, with the conclusions drawn in every section.

In sum, the nomination of Judge Anthony Kennedy is one that this committee can, upon due consideration, recommend for confirmation to the Senate. While the committee believes that Judge Kennedy's nomination should be confirmed, this conclusion should not be read as an endorsement of all aspects of the nominee's record by all members of the committee; members hold differing views about some aspects of that record. The committee's recommendation to the Senate thus merely reflects the members' collective conclusion that, on balance, and by virtue of Judge Kennedy's temperament, character, record and judicial philosophy, his nomination should be confirmed.

PART ONE: BACKGROUND AND QUALIFICATIONS

I. BACKGROUND

The committee received the President's nomination of Judge Anthony M. Kennedy to be an Associate Justice of the United States Supreme Court on November 30, 1987. The hearings on Judge Kennedy's nomination were held on December 14, 15 and 16, and the committee heard testimony from a total of 32 witnesses. The nominee testified for more than 11 hours on 2 days.

The committee carefully and thoroughly scrutinized the nominee's qualifications and credentials, his 12-year record—including more than 400 written opinions—as a Judge on the United States Court of Appeals for the Ninth Circuit and his 20 speeches. On

January 27, 1988, a quorum being present, the committee voted, 14 to 0, to report the nomination with a favorable recommendation.

AYES	NAYS
Mr. Biden	
Mr. Kennedy	
Mr. Byrd*	
Mr. Metzenbaum	
Mr. DeConcini	
Mr. Leahy	
Mr. Heflin	
Mr. Simon*	
Mr. Thurmond	
Mr. Hatch	
Mr. Simpson	
Mr. Grassley	
Mr. Specter	
Mr. Humphrey	

*By proxy.

II. THE NOMINEE

Judge Kennedy was born on July 23, 1936 in Sacramento, California. He attended Stanford University from 1954 to 1957, and the London School of Economics and Political Science during the year 1957–58. He received his Bachelor of Arts degree from Stanford in 1958. The nominee received his legal education at Harvard Law School, which he attended from 1958 to 1961. He graduated *cum laude* in 1961 with an LL.B degree.

Judge Kennedy enlisted in the California Army National Guard in August 1961 and was honorably discharged in September 1963.

From 1961 to 1963, the nominee engaged in the private practice of law with the San Francisco law firm of Thelen, Marrin, Johnson & Bridges.

From 1963 to 1966, he was a solo practitioner in Sacramento, having assumed charge of his late father's law practice.

In 1967, the nominee formed a partnership for the practice of law in Sacramento with Hugh A. Evans and H. Herbert Jackson. He continued in this partnership until 1975.

In 1975, President Ford appointed Judge Kennedy to the U.S. Court of Appeals for the Ninth Circuit, a position he has held since that time.

Since 1965, Judge Kennedy has taught constitutional law at the McGeorge School of Law, University of the Pacific.

III. THE AMERICAN BAR ASSOCIATION'S EVALUATION

A. The Standing Committee Unanimously Gave Judge Kennedy Its Highest Rating of "Well Qualified"

The American Bar Association's (ABA) Standing Committee on the Federal Judiciary, chaired by Judge Harold R. Tyler, Jr., unanimously found Judge Kennedy to be "Well Qualified," its highest rating. Based on its investigation, the Standing Committee determined that Judge Kennedy's "integrity is beyond reproach, that he enjoys justifiably a reputation for sound intellect and dili-

gence in his judicial work and that he is uniformly praised for his judicial temperament." (Letter from Judge Tyler to Chairman Biden, December 15, 1987, at 4.) The Standing Committee concluded that Judge Kennedy "is among the best available for appointment to the Supreme Court of the United States from the standpoint of professional competence, integrity and judicial temperament and that he is entitled to . . . [the] highest evaluation of a nominee to that Court because of the high standards which he meets." (*Id.* at 4–5; footnote omitted.)

B. The Standing Committee Conducted an Extensive Investigation

The Standing Committee conducted an extensive investigation of Judge Kennedy, including interviews with members of the Supreme Court and with many of his colleagues on the Ninth Circuit. Of the more than 480 persons interviewed by the Committee, more than 300 are federal or state judges. Of the remaining interviewees, approximately 100 are practicing attorneys and approximately 80 are law school deans and faculty members. (*Id.* at 2–3.)

Judge Kennedy's written opinions were examined by professors at three separate law schools. Faculty at the Fordham University Law School reviewed Judge Kennedy's constitutional law opinions in areas other than the First Amendment and parts of his criminal law record. Vermont Law School professors reviewed his environmental law opinions and certain administrative law opinions, together with his statutory civil rights opinions Professors at the University of Pennsylvania Law School reviewed Judge Kennedy's First Amendment, antitrust, securities and labor law opinions. In addition, all of Judge Kennedy's opinions were reviewed by a group of lawyers at Patterson, Belknap, Webb and Tyler. (*Id.* at 3–4.)

Three members of the Standing Committee personally interviewed Judge Kennedy on November 30, 1987. In addition, Judge Tyler talked with the nominee by telephone on several occasions. (*Id.* at 2.)

C. The Standing Committee Concluded that Judge Kennedy's Former Membership in Several Private Clubs Was Not a Disqualifying Factor

The Standing Committee examined Judge Kennedy's former membership in a number of private clubs with restrictive membership policies, having been expressly asked to do so in a November 20, 1987 letter from Chairman Biden.[1] Specifically, the chairman requested that the nominee's prior club memberships be examined in light of the commentary to Canon 2 of the ABA's Code of Judicial Conduct, which provides that "[i]t is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."

In an exchange with Senator Kennedy, Judge Tyler identified the reasons why the nominee's former club memberships did not affect the Standing Committee's overall assessment of his nomination:

---

[1] Judge Kennedy's former membership in these clubs and the committee's assessment of this issue are discussed in detail in Part Four, Section IV, *infra*.

> Senator KENNEDY. . . . It seems clear that you did not believe that his former membership affected your overall assessment of his qualifications for the Supreme Court, largely because he had tried to change the discriminatory policies and because he had resigned when the club's membership refused to change those policies. . . .
>
> Judge TYLER. Well, of course, what happened, we . . . looked into this considerably. Earlier, Chairman Biden wrote us a letter pointing out the language of Canon 2 . . . You fairly summarized . . . how we came out. **Because of what happened our Committee unanimously concluded that this business of membership in the Olympic Club was not a disqualifying factor here at all.** (Tr., 12/16/87, at 7; emphasis added.)

Judge Tyler added: "I suppose that one could say, looking at this record, that maybe [Judge Kennedy] might have been more sensitive to the problem earlier than he was, but we concluded that, on balance, he behaved in a respectable, responsible fashion and tried to live up to the sensible commands of Canon 2." (*Id.* at 8.)

Senator Kennedy also discussed with Judge Tyler the general question of continuing membership by federal judges in private clubs with restrictive membership policies:

> Senator KENNEDY. . . . Would the ABA Standing Committee view a federal judge's continuing membership in an exclusive club that discriminated on the basis of race or sex as adversely affecting the nominee's qualifications for elevation to a higher federal court?
>
> Judge TYLER. . . . I think it is perfectly fair, as your question suggested, . . . that this matter should be looked into, and I hope you understand that we do, in respect to looking into this problem, not only with regard to Supreme Court . . . nominees, but lower court nominees as well.
>
> * * * * *
>
> . . . I think where . . . the record shows that a club is really used for business and professional associations, meetings and so on, a judge should really, under Canon 2 and common sense, avoid that type of place. It leaves open, however, the question of whether or not he should attempt to persuade, for a while at least, that organization to change its policies. . . . I think our committee has to be concerned whether or not a judge is continuing to be a member of a club where he is well aware that there is purposeful activity to discriminate against women and minorities. So long as . . . [the] club . . . is not small and . . . is not confined closely to simply social events, et cetera. (*Id.* at 7, 8, 11.)

Judge Tyler concluded: "I do not think there is any doubt that this Committee for some time has been concerned about approaching the problem on these two levels." (*Id.* at 11.)

PART TWO: JUDGE KENNEDY'S JUDICIAL PHILOSOPHY AND APPROACH TO CONSTITUTIONAL INTERPRETATION

I. JUDGE KENNEDY HAS NO SINGLE, IMMUTABLE OR OVERARCHING THEORY FOR INTERPRETING THE CONSTITUTION, AND THUS HE PURSUES A CAUTIOUS AND MEASURED APPROACH

Much of the committee's examination and review of Judge Kennedy's record focused on the nominee's judicial philosophy and approach to interpreting the Constitution. The picture that emerges from Judge Kennedy's opinions, speeches and testimony is quite clear: The nominee is devoted to a principled search for "the correct balance in constitutional interpretation," (Tr., 12/15/87, at 17), and he studiously avoids a commitment to a narrow, fixed and unitary theory of interpretation. His approach is cautious and measured.

Particularly revealing was Judge Kennedy's response to Senator Specter's question: How far can one go "on the principle of interpretivism as fixed and resolute ideology for applications by the courts?" (Tr., 12/15/87, at 16.) Judge Kennedy stated that he does not have

> a complete cosmology of the Constitution. I do not have an overarching theory, a unitary theory of interpretation. I am searching . . . for the correct balance in constitutional interpretation. So many of the things we are discussing here are, for me, in the nature of exploration and not in the enunciation of some fixed or immutable ideas. (*Id.* at 17.)

He added: "I have not developed a comprehensive theory of law or a system of principles to be applied to every case that I have to decide." (Answer to written question No. 13 from Senator Simon.)

Judge Kennedy avoids fixed and immutable theories because, as he said in a 1980 speech, "as to some fundamental constitutional questions it is best not to insist on definitive answers. The constitutional system works best if there remain twilight zones of uncertainty and tension between the component parts of the government." (Untitled Speech, Salzburg, Austria, November 1980, at 11.) This statement demonstrates that Judge Kennedy properly recognizes the complexity of the Constitution and the need for a cautious and measured approach.

Several witnesses lauded Judge Kennedy's approach to constitutional interpretation. Laurence Tribe, professor of law at Harvard Law School, for example, commented that Judge Kennedy's speeches have "resisted the temptation to offer dogmatic, definitive answers to the most perplexing puzzles of our constitutional order." (Written statement of Professor Laurence Tribe, at 4.) Analyzing the nominee's opinions, Erwin Griswold, former solicitor general of the United States and longtime dean of Harvard Law School, testified that Judge Kennedy

> does not have an agenda. He is not reaching out for goals. He seems . . . to follow the true spirit of the case approach which is the heart of the common law; that is, take up this case, consider the facts which are applicable to this case, determine the law which you think applies to those facts, and decide this case. There are other cases out there, but do not decide them now. Wait until they come and see what the facts are when that time comes. (Tr., 12/16/87, at 131.)

Similarly, Paul Bator, professor of law at the University of Chicago Law School, testified that Judge Kennedy

> does not have an explicit dogmatic constitutional philosophy . . . [U]nderneath his opinions there appears a very firm philosophy of devotion to justice, devotion to law, of modesty and restraint in exercising . . . the immense power of the judge, and the courage and willingness to speak out on behalf of the law and the Constitution, where that is required. (*Id.* at 297.)

II. JUDGE KENNEDY EMBRACES THE CONSTITUTION AS A DYNAMIC, EVOLVING DOCUMENT

Judge Kennedy's speeches, as well as his testimony before the committee, demonstrate that he views the Constitution in dynamic and evolving terms. In his view, each succeeding generation adds new insights to the core principles laid down in that grand document; he recognizes that we can learn from history and from the tradition of interpreting the Constitution. The nominee believes that with the progression of time, judges become more capable of divining what the original constitutional provisions mean and should be interpreted to mean.

Underlying this approach is an important theme: In Judge Kennedy's view, the Framers believe that the Constitution would create a better society. "It would serve no purpose," he testified, "to have a Constitution which simply enacted the status quo." (Tr., 12/15/87, at 14.) And responding to a question from Senator Specter, the nominee said:

> . . . The Framers of the Constitution originally, in 1789, knew that they did not live in a constitutionally perfect society, but they promulgated the Constitution anyway. They were willing to be bound by its consequences. (*Id.* at 6.)

Judge Kennedy added: "The whole lesson of our constitutional experience has been that a people can rise above its own injustice; that a people can rise above the inequities that prevail at a particular time." (*Id.*)

Because the Constitution did more, in Judge Kennedy's view, than simply enact the status quo, he recognizes that its meaning must evolve continually over time. In his 1980 Salzburg speech, for example, Judge Kennedy said that "[t]he constitutional system provides a dynamic mechanism for creative achievement in a framework that preserves our values." (Salzburg speech, at 15.) And in a 1984 speech, the nominee stated: "Change within the mainstream of our constitutional tradition is necessary. . . . The framers of the

Constitution would not have used such **spacious phrases** as due process, cruel and unusual punishment, equal protection of the laws, if they had thought otherwise." (Untitled speech, Sacramento Chapter of the Rotary Club, February 1984, at 6; emphasis added.) Suggesting that the content of such "spacious phrases" must develop over time, the nominee then quoted John Marshall's command that has proved so relevant to our 200-year history: " 'The Constitution was intended to endure for ages to come, and consequently to be adopted to the various crises of human affairs.' " (*Id.*)

Throughout his testimony, Judge Kennedy underscored the importance and relevance to constitutional interpretation of 200 years of history. That history, said Judge Kennedy, gives the courts today an advantage over even contemporaries of the Constitution itself in understanding and applying the document's majestic promises. In response to a question from Chairman Biden, the nominee said: "I think 200 years of history gives us a magnificent perspective on what the Framers did intend, on what they did plan, on what they did build, on what they did structure for this country." (Tr., 12/15/87, at 89.) And in response to a question posed by Senator Byrd, the nominee reiterated this view:

> . . . [T]he Court can use history in order to make the meaning of the Constitution more clear. As the Court has the advantage of a perspective of 200 years, the Constitution becomes clearer to it, not more murky. The Court is in a superior advantage to the position held by Mr. Chief Justice Marshall when he was beginning to stake out the meanings of the Constitution in the great decisions that he wrote.
>
> And this doesn't mean the Constitution changes. It just means that we have a better perspective of it. . . . To say that **new generations yield new insights and new perspectives,** that doesn't mean the Constitution changes. It just means that our understanding of it changes.
>
> . . . [T]he idea that the Framers **made a covenant with the future** is what our people respect, . . . and I am committed to that principle. (*Id.* at 199–200; emphasis added.)

Judge Kennedy's notion of an evolving understanding of the Constitution also is apparent in some of his opinions. In *Spain* y *Procunier,* 600 F.2d 189 (9th Cir. 1979), for example, the nominee's majority opinion included a revealing passage about the Eighth Amendment:

> Underlying the Eighth Amendment is a fundamental premise that prisoners are not to be treated as less than human beings. . . . The amendment is phrased in general terms rather than specific ones **so that while the underlying principle remains constant in its essentials, the precise standards by which we measure compliance with it do not. . . .** [T]he court's judgment must be informed by **current and enlightened** scientific opinion as to the conditions necessary to insure good physical and mental health for prisoners. (*Id.* at 200.)

According to Judge Kennedy, therefore, our understanding of the Eighth Amendment's prohibition of cruel and unusual punishment—a "spacious phrase," in his words—is not necessarily the same today as it was in 1791, when the Amendment was ratified.

Thus, as Robert McKay, professor of law at and former dean of New York University Law School, wrote, Judge Kennedy respects the Constitution "as its meaning evolves over time. . . ." (Written statement of Robert McKay, at 1.) Similarly, Dean Griswold, describing Judge Kennedy's approach, said that"there are clauses like the Due Process Clause and the Equal Protection Clause and Cruel and Unusual Punishment, which I will not say are wide open but which are certainly not specific and which are subject to evaluation from time to time in the light of the circumstances which exist at the time." (Tr., 12/16/87, at 132.) The committee agrees with these and other witnesses that the fundamental law of the Constitution is an evolving concept.

III. JUDGE KENNEDY HAS A FLEXIBLE NOTION OF "ORIGINAL INTENT"

Judge Kennedy's testimony, as well as several of his speeches, make clear that, in his view, "original intent" is an important—but is not the sole—frame of reference in resolving constitutional questions. His emphasis on the need for a continuing examination of the Constitution's core principles leads him to reject any theory that would make the Framers' "original intent" dispositive; in Judge Kennedy's view, "original intent" surely has a role in constitutional adjudication, but it does not tell a judge how to decide a case. His philosophy and approach thus require consideration of a number of additional sources in interpreting the Constitution.

A. Judge Kennedy Views "Original Intent" as an Objective, Not a Methodology

Judge Kennedy recognizes that "the words of the Constitution must be the beginning of our inquiry." (Tr., 12/14/87, at 92.) And he has said that "there must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the Framers." (Untitled speech, Ninth Circuit Judicial Conference, August 21, 1987, at 4.) Judge Kennedy also acknowledges, however, that those "announced declarations" and the "language of the framers" will often be of limited utility: "[W]hen you have spacious phrases like are contained in the 14th Amendment," he has said, "the answer in the text is not clearly there." (*Id.* at 5.)

This leads Judge Kennedy to the conclusion that **"original intent is best conceived of as an objective rather than a methodology."** (*Id.*.; emphasis added.) When asked by Senator Grassley to elaborate on this point, the nominee responded:

> I think what I had in mind there was to indicate that the doctrine of original intent is not necessarily helpful as a way to proceed in evaluating a case; but that really it is one of the things that we want to know.
>
> The doctrine of original intent does not tell us how to decide a case. Intention, though, is one of the objectives of

> our inquiry. . . . I just did not think that original intent was very helpful as a methodology, as a way of proceeding, because it just restates the question. (Tr., 12/14/87, at 223–24.)

B. Judge Kennedy Relies on a Number of Sources in Resolving Constitutional Questions

Because original intent is simply "one of the things that we want to know," Judge Kennedy looks to a number of other sources in resolving constitutional questions. He urged in one of his speeches that "[t]he Constitution cannot be divorced from its logic and its language, the intention of its Framers, the precedents of the law, and the shared traditions and historic values of our people." (1984 Rotary Club speech, at 7.) He testified in response to an inquiry from Senator Grassley that "[w]hen a judge hears a constitutional case, [he or she] gets an understanding of the Constitution from many sources: from arguments of counsel; from the nature of the injuries and the claims asserted by the particular person; and from the reading of the precedents of the court, and the writings of those who studied the Constitution." (Tr., 12/14/87, at 222.) And in response to a question from Chairman Biden, the nominee said that "the object of our inquiry is to use history and to use the case law and to use our understanding of the American constitution tradition in order to determine the intention of the document broadly expressed." (*Id.* at 94.)

The committee agrees with Judge Kennedy that these are all important and appropriate sources for interpreting the Constitution.

C. Judge Kennedy's Theory of "Original Intent" Looks to the Framers' Official Purpose, Public Acts and Announced Declarations Rather than to Their Actual Thought Processes

It is clear from an extensive series of colloquies about the 14th Amendment between Senator Specter and the nominee that Judge Kennedy has a broad vision of "original intent." Specifically, Senator Specter questioned Judge Kennedy on his views of intent in light of the segregated schools that existed at the time the 14th Amendment was drafted and ratified. He posed the hypothetical of whether the Supreme Court's decision in *Brown* v *Board of Education,* 347 U.S. 483 (1954), was inconsistent with the intent of the drafters of the Amendment.

In Judge Kennedy's view, the existence of segregated schools at the time the Amendment was ratified is not in any way dispositive. He flatly rejected a narrow view of intent limited to "simply what someone thought they were doing at the time." (Tr., 12/15/87, at 10.) He said that the specific subjective intentions of the drafters of the Amendment—their actual thought processes and the results that they may have expected at the time—should not bind the court; instead, "the principal inquiry should be on the official purpose, the official intent as disclosed by the Amendment." (*Id.* at 9.) "What is important," said Judge Kennedy, "are the public acts

that accompanied the ratification of, in this case, the 14th Amendment." (*Id.* at 6.) [2]

Judge Kennedy testified further that he "do[es] not think that the Fourteenth Amendment was designed to freeze into society all of the inequities that then existed," (*id.* at 11), because

> a people can rise above the inequities that prevail at a particular time . . . .[T]he Fourteenth Amendment was intended to eliminate discrimination in public facilities on the day that it was passed because that is the necessary meaning of the actions that were taken and of the announcements that were made. (*Id.* at 6–7.)

In Judge Kennedy's view, those who addressed the 14th Amendment specified their purpose in broad, general terms. And that purpose is evident, he said, from a number of sources. For example, "the abolitionist writings are critical to an understanding of the Fourteenth Amendment. It was in response to their concerns that the Amendment was enacted." (*Id,* at 9.) The purpose of the Amendment is also "abundantly clear from the text of the language, which admits of no exception. . . ." (*Id.* at 12.)

This view of original intent leads Judge Kennedy to conclude that "*Brown* v. *Board of Education* was right when it was decided, and I think it would have been right if it had been decided 80 years ago or 80 years before. I think *Plessy* v. *Ferguson* [163 U.S. 537 (1896)] was wrong on the day it was decided." (*Id.* at 7.)

The committee is encouraged by Judge Kennedy's broad vision of "original intent." Recognizing that the Framers of the Constitution, as well as the drafters of the subsequent amendments, took a global view of their acts, he appreciates the objective principles and premises implicit in their majestic words.

IV. THE RECORD DEMONSTRATES THAT JUDGE KENNEDY IS A GENUINE ADVOCATE OF JUDICIAL RESTRAINT

The nominee's opinions on the Ninth Circuit, as well as his testimony before the committee, demonstrate that he is a genuine advocate of judicial restraint. Restraint appears to be a hallmark, in fact, of much of his over-all record.

A. Judge Kennedy's Opinions Suggest that He Adheres to the Doctrine of Judicial Restraint

Upon extensive review of the nominee's judicial record, the committee has determined that, on balance, his opinions show that he adheres to judicial restraint. As Senator Simpson said, "his opinions . . . show . . . [an] important willingness to go as far as he can without necessarily going any further into his own philosophies. . . ." (Tr., 12/16/87, at 104.)

In *Chadha* v. *INS,* 634 F.2d 408 (9th Cir. 1980), *aff'd,* 462 U.S. 919 (1983), Judge Kennedy's opinion foreshadowed the Supreme Court's invalidation of the legislative veto. He reasoned that to place the disapproval power in the hands of one house of the legislature

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[2] Judge Kennedy reiterated this view in an exchange with Senator Hatch, referring to "original intent" as "the legal consequences of [the Framers' or drafters'] acts" and "not their subjective motivations." (Tr., 12/15/87, at 108, 110.)

threatens the tyranny of concentrated power that the separation of powers doctrine was designed to prevent. Judge Kennedy's opinion was narrowly crafted and more limited in result that the Chief Justice Burger's majority opinion for the Supreme Court. As he said in a 1984 speech: "In our court we left open the possibility of further analysis or doctrinal elaboration by confining the opinion to the case before us. This was implied acknowledgement that some forms of legislative veto might survive." (Hoover Lecture, Stanford University, May 17, 1984, at 1.)

In *Beller* v. *Middendorf,* 632 F.2d 788 (9th Cir. 1980), *cert. denied sub nom., Beller* v. *Lehman,* 452 U.S. 905 (1981), Judge Kennedy's majority opinion upheld the constitutionality of Navy regulations requiring the discharge of those found to have engaged in homosexual activity. The opinion found that in light of the particular need of the military, such activity was not protected by the right to privacy. Demonstrating the cautious restraint that is characteristic of many of his opinions, Judge Kennedy decided only the question before him in *Middendorf* and left open the question of "what might be constitutionally protected activity in some other contexts." (632 F.2d at 812.)

In the statutory context, Judge Kennedy has demonstrated a willingness to abide by the precise terms of a statute even if they compel him to reach a result with which he disagrees. In *U.S.* v. *Peloquin,* 810 F.2d 911 (9th Cir. 1987), for example, Judge Kennedy's opinion reversed a defendant's conviction in order to comply with the technical requirements of the Speedy Trial Act, even though he was displeased with that result:

> The government also argues that there are policy reasons for not giving defendants the chance to wiggle off the hook because of Speedy Trial Act dismissals. This may be so. But we are not in the business of drafting statutes. This task we leave to Congress. (810 F.2d at 913.)

See also Schreiber Distributing Co. v. *Serv-Well Furniture Co., Inc.,* 806 F.2d 1393 (9th Cir. 1986); *Gallea* v. *United States,* 779 F.2d 1403 (9th Cir. 1986).

B. Judge Kennedy Takes a Balanced Approach to the Role of the Courts in the Entitlements Area

Judge Kennedy recognizes that the Constitution is dynamic, that many of its key terms are fluid and that the role of the judge is to give those terms meaning in light of 200 years of history and experience. At the same time, however, Judge Kennedy's testimony indicates that he does not believe that the Constitution empowers judges to create what, in their personal vision, happens to be a just society.

The committee questioned Judge Kennedy extensively about his assertion in a 1986 speech that "essential rights in a just system" are "not coextensive" with "essential rights in our own constitutional system." ("Unenumerated Rights and the Dictates of Judicial Restraint," Canadian Institute for Advanced Legal Studies speech, July 24–August 1, 1986, at 13.) In that speech, the nominee disagreed with those who argue that the courts must enforce certain minimum entitlements, such as education, housing and nutri-

tion, if the constitutional system is to work. (*Id.* at 17.) Judge Kennedy testified that the constitutional responsibility to address those needs lies generally with the legislature and not with the courts. (Tr., 12/15/87, at 20.) And he said in response to a question from Senator Leahy, "the Framers did not give courts authority to create a just society." (*Id.* at 47.)

Judge Kennedy is thus a clear advocate of judicial restraint in this area. His deference to the legislature is not absolute, however, as he accepts a limited role for the judiciary. This is clear from an exchange with Senator Leahy:

> Senator LEAHY. So there are some essential rights in our own constitutional system, to use your words, that are not explicitly spelled out in the Constitution, but are enforceable by our Federal courts?
>
> Judge KENNEDY. The equal protection jurisprudence makes that rather clear. (*Id.* at 48.)

Judge Kennedy reiterated that "even here there is an area for the courts to participate in." (*Id.*)

Judge Kennedy thus takes a restrained yet balanced approach to the role of the courts in the entitlements area, emphasizing that it is not for the judiciary to create and enforce every right that might exist in a just society.

V. JUDGE KENNEDY'S TESTIMONY SUGGESTS THAT HE HAS AN ABIDING RESPECT FOR PRECEDENT

As Senator Thurmond stated, "a fundamental principle of American judicial review is respect for precedent, for the doctrine of *stare decisis.*" (Tr., 12/14/87, at 105.) In neither his opinions on the court of appeals nor in his speeches has Judge Kennedy commented on the value of precedent in our constitutional tradition or on the factors upon which he would rely in determining whether a decision should be overruled. His testimony on this all-important issue was thus critical to gaining a thorough understanding of his judicial philosophy.

Judge Kennedy's most extensive testimony on this issue came in response to questioning by Senator Heflin. With respect to his approach generally to stare decisis and to its role in our system of law, Judge Kennedy stated:

> Stare decisis is really a description of the whole judicial process which proceeds on a case-by-case basis as judges slowly and deliberately decide the facts of a particular case and hope that their decision in this case yields a general principle that may be of assistance to themselves and to later courts.
>
> Stare decisis insures impartiality. . . . It ensures that from case to case, from judge to judge, from age to age, the law will have a stability that the people can understand and rely upon. . . .
>
> Now there have been discussions that stare decisis should not apply as rigidly in the constitutional area as in other areas, and the argument is that there is no other overruling body in the constitutional area. . . . On the

> other hand, . . . it seems to me that when judges have announced that a particular rule is found in the Constitution that is entitled to very great weight, the Court does two things. It interprets history and it makes history, and it has got to keep those two roles separate. Stare decisis helps them do that. (Tr., 12/14/87, at 211–12.)

Judge Kennedy also identified for Senator Heflin the factors upon which he would rely in determining whether a case should be overruled:

> In any case . . . the role of the judge is to approach the subject with an open mind, to listen to the counsel, and to look at the facts of the particular case to see what the injury is, see what the hurt is, to see what the claim is; and then to listen to his or her colleagues, and then to research the law. What does the most recent decision, the decision that is before the Court if it is subject to being examined for possible overruling, if that is the case, what does that decision say? What is its logic? What is its reasoning? What has been its acceptance by the lower courts? Has the rule proven to be workable? Does the rule fit with what the judge deems to be the purpose of the Constitution as we have understood it over the last 200 years? And history is tremendously important in this regard. (*Id.* at 211.)

And under questioning from Senator Leahy, Judge Kennedy added that courts should "look to see how the great Justices that have sat on the court for years have understood and interpreted the Constitution, and from that you get a sense of what the Constitution really means." (Tr., 12/15/87, at 58–59.)

In his testimony, Judge Kennedy also indicated that he does not have any list of cases that he believes should be overruled. The following exchange is informative on this point:

> Senator HUMPHREY. Quoting . . . from your Stanford speech, Judge, you said: The unrestrained exercise of judicial authority ought to be recognized for what it is—the raw exercise of political power.
>
> * * * * *
>
> . . . Is Anthony Kennedy concerned that judges have sometimes overreached? . . . Is it your view that at times in our history, the Supreme Court has overreached, has exercised, rawly exercised political power?
>
> Judge KENNEDY. There are a few cases where it is very safe to say that they did, the *Dred Scott* case being the paradigmatic example of judicial excess.
>
> Senator HUMPHREY. . . . How about in modern times? . . .
>
> Judge KENNEDY. I did not really have a list of cases in mind. I had more in mind an approach, an attitude that I sometimes see reflected on the bench.Jacket 019–119 Folios 750–751 Extensions A013er.013
>
> The CHAIRMAN. If I understand the answer to the question the Senator asked, is that there are no specific cases

which you had in mind when you referred to the unrestricted exercise——

Judge KENNEDY. That is correct. None come immediately to mind. But that concern always underlies the examination by a judge of his own writings. . . .

* * * * *

Senator HUMPHREY. This approach and attitude which caused you to make the statement cautioning against unrestrained exercise of judicial authority . . . is that something that bothers you, professionally?

Judge KENNEDY. **Well, I do not think the judiciary of the United States, as a whole, has departed from its mandate or its authority,** but I simply think it is a concern that must always remain . . . in the open, so that judges are aware of the limitations on their authority. (Tr., 12/15/87, at 66–70; emphasis added.)

Judge Kennedy's testimony shows a respect for precedent. While he may from time to time seek further movement in the law, there is no evidence of a desire for abrupt departures from carefully developed doctrines or established lines of decisions. As summarized by Professor Tribe:

> Judge KENNEDY . . . has both expressed in his speeches, and exemplified in his judicial work, a commitment to gradual evolution of doctrine and precedent, within the context of a principled exposition of constitutional text, history and structure that is not tied down by any doctrinaire and backward-looking philosophy of an originalist sort.
>
> * * * * *
>
> [To Judge Kennedy,] stare decisis is less a method or doctrine than a summary of how courts, building their understanding of texts and traditions in part upon the perceptions of their judicial predecessors, inevitably operate in a system such as ours. . . . Ideally, in the judicial world envisioned by Judge Kennedy, it is the ongoing process of refining and perfecting the vision of the future implicit in the work of the past that marks the judge's vision. (Answer of Professor Laurence Tribe to written question from Chairman Biden.)
>
> * * * * *

Judge Kennedy's testimony about this over-all judicial philosophy and approach to constitutional interpretation was informative, enlightening and encouraging. It is clear that he has no definitive, overarching theory to explain the Constitution but is instead still searching for a better understanding of the document and the difficult questions it often presents. His view that "New generations add new insights"—that our capacity to understand the basic principles established by the Framers improves with time—is distinctive and is likely to contribute to our evolving understanding of the Constitution.

PART THREE: JUDGE KENNEDY'S VISION OF LIBERTY UNDER THE CONSTITUTION

I. JUDGE KENNEDY'S APPROACH TO LIBERTY AND FUNDAMENTAL RIGHTS IS WITHIN THE TRADITION OF SUPREME COURT JURISPRUDENCE

The established jurisprudence of the Supreme Court holds that the "liberty" clauses of the 5th and 14th Amendments protect against governmental invasion of a person's substantive liberty and privacy. Each of the 105 previous and current Justices has endorsed the view, expressed in a variety of ways, that the Constitution protects some rights that are not spelled out in the text and has not interpreted the Constitution as a narrow code of enumerated rights. The second Justice Harlan, for example, recognized that liberty "is not a series of isolated points pricked out" in terms of specific consitutional provisions but is instead "a rational continuum which, broadly speaking, includes a freedom from all substantial and arbitrary impositions and restraints." (*Poe* v. *Ullman,* 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).)

Judge Kennedy's views, particularly as set forth in his testimony, appear to be within this 200-year tradition establishing that the people retain certain fundamental rights that courts are to discern and protect. This is evident, for example, from an exchange between Senator Heflin and Judge Kennedy, in which the nominee was asked about his statement (*see* Canadian Institute speech, at 18–20) that most rights in the Constitution are enforced as negatives or prohibitions, rather than an affirmative grants:

> Senator HEFLIN. . . .You seem to view these prohibitions in the Constitution as limiting the expansion of judicial power. **Are they also, though, a means of preventing Government from denying individuals their fundamental rights?**
>
> Judge KENNEDY. **I would agree that they certainly are, Senator.** . . . (Tr. 12/14/87, at 209–10; emphasis added.)

Judge Kennedy's record also makes clear that he rejects the view that the people have no liberties except those specifically granted to them by their Government. As he said in a recent speech, "[a]s the Framers progressed with their studies, [republican government] came to mean . . . a government that emanates from the people, rather than being a concession to the people from some overarching sovereign." ("Federalism: The Theory and the Reality," Historical Society for the United States District Court for the Northern District of California, October 26, 1987, at 3.) This is consistent with an acceptance of our Constitution as establishing a system by which the people have all the liberties except those specifically relinquished to the Government.

The committee agrees with Judge Kennedy that the "underpinning of our Constitution is a great heritage that ensures our written Constitution is a living reality, not, in Madison's phrase, a mere 'parchment barrier.' " (Answer to written question No. 5 from Senator Simon.)

II. JUDGE KENNEDY PLACES GREAT WEIGHT ON THE PRESERVATION AND ADVANCEMENT OF INDIVIDUAL LIBERTY

One approach to liberty and fundamental rights is that taken by the second Justice Harlan, one of the great judicial conservatives of this century. He argued for a conception of the due process clause that was flexible and was independent of, but drawing support from, the Bill of Rights. The clearest exposition of his view is in *Poe* v. *Ullman, supra,* in which he said:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented **the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.** . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. **That tradition is a living thing.** (*Poe*, 367 U.S. at 542 (Harlan, J., dissenting).)

And in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), Justice Harlan stated that proper consitutional analysis required an examination of whether the law "infringes the Due Process Clause of the Fourteenth Amendment because the enactment violated basic values **implicit in the concept of ordered liberty.**' " (381 U.S. at 500; emphasis added, Harlan, J., concurring.) [3]

Judge Kennedy's views appear to be within the tradition exemplified by Justice Harlan. In his testimony, for example, the nominee emphasized the relationship between order and liberty and the role of the court in finding the proper balance. He said in response to a question from Senator Hatch that "I do not think that there is a choice between order and liberty. We can have both. Without **ordered liberty,** there is no liberty at all." (Tr., 12/14/87, at 157; emphasis added; *see also* Tr., 12/15/87, at 146 ("You may have order and liberty, and without both you only have anarchy.").)

Judge Kennedy's testimony also reveals a recognition on his part that a principal objective of this Nation's founders was the preservation and advancement of individual liberty. Indeed, the term "liberty" in the 5th and 14th Amendments is a key watchword for Judge Kennedy. This is clear from an exchange with Chairman Biden:

> Judge KENNEDY. The Framers had an idea which is central to Western thought. . . . It is central to the idea of the rule of law. **That is that there is a zone of liberty, a zone of protection, a line that is drawn where the individual**

[3] Justice Harlan relied here on Justice Cardozo's often-cited statement that there are certain "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" and thus "implicit in the concept of ordered liberty." (*Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937).)

> **can tell the Government: Beyond this line you may not go.**
>
> Now the great question in constitutional law is: One, where is the line drawn? And, two, what are the principles that you refer to in drawing this line?
>
> The CHAIRMAN. **But there is a line.**
>
> Judge KENNEDY. **There is a line.** It is wavering; it is amorphous; it is uncertain. **But this is the judicial function.** (Tr., 12/14/87, at 93; emphasis added.)

Importantly, Judge Kennedy does not view the Constitution as essentially a zero-sum system, in which the rights for some necessarily come only at the expense of others. He agreed with Senator Simon's statement that "in our society . . . when you expand the liberty of any of us, you expand the liberty of all of us," and noted that when the Supreme Court has extended the liberty of some, "all of our freedoms have been enhanced." (Answer to written question No. 2 from Senator Simon.)

In Judge Kennedy's view, therefore, the core question is how far liberty extends and not whether it exists in the first instance. Judge Kennedy looks for the "wavering line" between the state and the individual so that he may mark the boundaries of the "zone of liberty." And a right protected by the liberty clause need not be specifically mentioned in the text of the Constitution, since "liberty," as that term is understood by this nominee, "extends beyond the substantive points that are marked out in the Bill of Rights." (Tribe testimony, Tr., 12/16/87, at 98.)

III. JUDGE KENNEDY'S UNDERSTANDING OF THE DUE PROCESS CLAUSE PROTECTS THE VALUES OF PRIVACY

A. Judge Kennedy's Concept of Liberty Encompasses the Values of Privacy, Including the Right to Marital Privacy

Judge Kennedy testified that the due process clause protects the values of privacy. This was clear in an exchange with Senator DeConcini:

> Senator DECONCINI. . . . [I]t appears from reading your [Canadian Institute] speech, that you have concluded, without question, that there is a fundamental right to privacy. And I think the Chairman had you state that, and that is your position, correct?
>
> Judge KENNEDY. Well, I have indicated that that is essentially correct. I prefer to think of the value of privacy as being protected by the clause, liberty, and maybe that is a semantic quibble, maybe it is not.
>
> Senator DECONCINI. But it is there, is that——
>
> Judge KENNEDY. Yes, sir.
>
> Senator DECONCINI. **No question about it being in existence?**
>
> Judge KENNEDY. **Yes, sir.** (Tr., 12/14/87, at 176; emphasis added.)

Senator Leahy pursued this point further, asking Judge Kennedy whether in fact he had only a semantic quibble. (Tr., 12/15/87, at 41.) Judge Kennedy responded:

> **. . . I think that the concept of liberty in the due process clause is quite expansive, quite sufficient, to protect the values of privacy that Americans legitimately think are part of their constitutional heritage. . . . It is very clear that privacy is a most helpful noun, in that it seems to sum up rather quickly values that we hold very deeply.** (*Id.* at 42; emphasis added.) [4]

Then, in an exchange with Chairman Biden, Judge Kennedy stated that in his view, the Constitution protects a marital right to privacy:

> The CHAIRMAN. . . . Do you think *Griswold* was reasoned properly?
>
> Judge KENNEDY. I really think I would like to draw the line and not talk about the *Griswold* case so far as its reasoning or result.
>
> I would say that if you were going to propose a statute or a hypothetical that infringed upon the core values of privacy that the Constitution protects, you would be hard put to find a stronger case than *Griswold.*
>
> The CHAIRMAN. . . . **Is there a marital right to privacy protected by the Constitution?**
>
> * * * * *
>
> Judge KENNEDY. . . . **Yes, sir.** (*Id.* at 42–43; emphasis added.)

B. Judge Kennedy's Dissent in *United States* v. *Penn* Demonstrates His Respect for Privacy and Family Rights and His Willingness to Apply Existing Decisions to Novel Situations

Judge Kennedy's dissent in *United States* v. *Penn,* 647 F.2d 876 (9th Cir.), *cert. denied,* 449 U.S. 903 (1980), demonstrates his respect for fundamental rights involving privacy and the family. He argued that the police violated the Fourth Amendment by offering $5 to a 5-year-old child in order to get him to inform them where his mother kept her heroin. In Judge Kennedy's view:

> The existence of the parent-child union and the fundamental place it has in our culture require no citation, but it is perhaps appropriate to note that courts have protected it where the threat of disruption is in some respects more attentuated than in the circumstances of the case before us. *See Moore* v. *City of East Cleveland,* 431 U.S. 494 (1977), *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925).
>
> . . . [W]e have the authority, and the duty, to protect the relation between a mother and child from such manipulation.
>
> . . . I view the police practice here as both pernicious in itself and dangerous as precedent. Indifference to personal

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[4] Judge Kennedy reiterated this point in response to a written question from Senator Simon, noting that "I believe that the liberty protected by the Fifth and Fourteenth Amendments includes protection for the value that we call privacy." (Answer to written question No. 12 from Senator Simon.)

liberty is but the precursor of the state's hostility to it. (*Id.* at 888–89.)

This statement shows respect for the parent-child relationship. Furthermore, it illustrates Judge Kennedy's support for the view expressed in the Supreme Court decisions cited that the Constitution protects aspects of that relationship. Judge Kennedy's willingness to apply these cases to a novel situation also demonstrates a genuine commitment to the idea of a living and evolving Constitution.

IV. IN JUDGE KENNEDY'S VIEW, PRIVACY IS AN IMPORTANT PART OF THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE

During his appearance before the committee, Judge Kennedy was asked by Senator Leahy about his opinion in *Beller* v. *Middendorf, supra,* Part Two, Section IV. The following exchange took place:

> Judge KENNEDY We . . . came to the conclusion, as stated in the opinion, that the Supreme Court has recognized that there is a substantive component to the due process clause.
>
> And I was willing to assume that for the purposes of [the] opinion. **And I think that is right; I think there is a substantive component to the due process clause.**
>
> Senator LEAHY. And that is your view today?
>
> Judge KENNEDY. Yes. . . . **And I think the value of privacy is a very important part of that substantive component.** (Tr., 12/15/87, at 43–44; emphasis added.)

V. JUDGE KENNEDY HAS A REASONED AND BALANCED APPROACH TO THE NINTH AMENDMENT, ONE THAT IS FULLY CONSISTENT WITH HIS UNDERSTANDING OF "LIBERTY" IN THE DUE PROCESS CLAUSE

Judge Kennedy was quite careful in expressing his views about the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." One view was that the Amendment was designed to protect the ability of the States to confer rights beyond those in the Bill of Rights. (*See, e.g.,* Tr., 12/14/87, at 96; Tr., 12/15/87, at 79.) A second view is that the Amendment shows a belief by the Framers "that the first eight amendments were not an exhaustive catalogue of all human rights." (Tr., 12/15/87, at 79.) In fact, Judge Kennedy testified that "the Court is treating [the Ninth Amendment] as something of a **reserve clause,** to be held in the event that that the phrase 'liberty' and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision." (Tr., 12/14/87, at 97; emphasis added.)

Chairman Biden raised the Ninth Amendment with Judge Kennedy in the context of Chief Justice Burger's majority opinion in *Richmond Newspapers* v. *Virginia,* 448 U.S. 555 (1980). Writing that "the concerns expressed by Madison and others have . . . been resolved; fundamental rights, even though not expressly guaranteed,

have been recognized by the court as indispensable to the enjoyment of rights not explicitly defined," the Chief Justice cited the Ninth Amendment. (*Id.* at 580.) And he referred to it as a "constitutional savings clause," (*id.* at 579, n.15), a term quite similar to the "reserve clause" idea invoked by Judge Kennedy. Most importantly, Judge Kennedy responded to the chairman's reference to *Richmond Newspapers* by noting that the Court has not found it necessary to rely on the Ninth Amendment because "liberty can support" the Chief Justice's conclusions about fundamental rights. (Tr., 12/15/87, at 219.)

VI. JUDGE KENNEDY ACCEPTS A CLEAR ROLE FOR THE COURTS IN THE FUNDAMENTAL RIGHTS AREA

The hearings made clear that Judge Kennedy favors an appropriate role for the courts in defining the contours of "liberty" and in determining whether it extends to situations not previously addressed. The nominee testified, for example, that despite the difficult questions in this area, the courts have a clear responsibility to act. (Tr., 12/14/87, at 95.) Furthermore, referring to the line between protection for the individual and governmental interference, Judge Kennedy said: "The Supreme Court's role is to determine where that line is drawn and to determine what principles are to be used in defining the protections contained within the zone of liberty." (Answer to written question No. 1 from Senator Simon.)

When asked by Senator DeConcini "[h]ow would you define the enforcement power given to the judiciary," (Tr., 12/14/87, at 178), Judge Kennedy responded:

> Well, the enforcement power of the judiciary to ensure that the word liberty in the Constitution is given its full and necessary meaning, consistently with the purposes of the document as we understand it. (*Id.* at 178.)

Judge Kennedy added in response to a question from Senator Humphrey that "[t]he Framers had . . . a very important idea when they used the word 'person' and when they used the word 'liberty.' And these words have content in the history of Western thought and in the history of our law and in the history of the Constitution, and I think judges can give that content." (Tr., 12/15/87, at 204.)

In Judge Kennedy's view, however, liberty and privacy are not boundless or unlimited. When Senator Humphrey asked whether the due process clause is "a blank check," for example, Judge Kennedy said, "[c]ertainly not." (*Id.* at 64.) Judge Kennedy's position is that the contours and limits of liberty are debatable and that it is the role of the courts to decide cases within the confines of that debate. With respect to the right of privacy, Judge Kennedy said, "we are very much in a stage of evolution and debate . . . [W]e are still in a very rudimentary state of the law so far as the right of privacy is concerned." (*Id.* at 45–46.) And Judge Kennedy stressed that "the Constitution is made for that kind of debate. The Constitution is not weak, because we do not know the answer to a difficult problem. It is strong because we can find that answer." (*Id.*)

Judge Kennedy provided the committee with some criteria he would use to define the contours of liberty in a particular case. Re-

sponding to a question from Senator Humphrey about the standards available to the court "to determine which private consensual activities are protected by the Constitution and which are not," (Tr., 12/15/87, at 80), Judge Kennedy identified the following factors:

> [T]he essentiality of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person not to obtain his or her own self-fulfillment, the inability of a person not to reach his or her own potential. (*Id.* at 80.)

And in response to a question from Senator Leahy, Judge Kennedy said:

> [E]ssentially, we look to see the concept of individuality and liberty and dignity that those who drafted the Constitution understood . . . We see whether or not the right has been accepted as part of the rights of a free people in the historical interpretation of our own Constitution and the intention of the Framers. (*Id.* at 57.)

Judge Kennedy also indicated that these factors must be balanced against the interests asserted by the state. Those interests, he said,

> are very strong. . . . There is the deference that the court owes to the democratic process, the deference that the court owes to the legislative process, the respect that must be given to the role of the legislature, which itself is an interpreter of the Constitution, the respect that must be given to the legislature because it knows the values of the people. (*Id.* at 80–81.)

* * * * *

The committee did not ask for, of course, nor did it receive, any guarantees as to how a "Justice" Kennedy would resolve future cases involving liberty and privacy issues. Nevertheless, the committee was encouraged by Judge Kennedy's testimony on the liberty protected by the Constitution. Indeed, his evolving understanding of the commands of the 5th and 14th Amendments that no person shall be deprived of "life, liberty, or property, without due process of law;" his recognition that the liberty clause is a "spacious phrase;" his belief that it protects the values of privacy; and his clear acceptance of a role for the courts in outlining the contours of liberty—no matter how difficult such questions might be—all suggest that, if confirmed as the 106th Justice, he would be within the 200-year tradition of Supreme Court jurisprudence.

PART FOUR: JUDGE KENNEDY AND CIVIL RIGHTS

I. JUDGE KENNEDY'S OVER-ALL RECORD DOES NOT EVIDENCE AN ANTIPATHY TO THE JUDICIAL VINDICATION OF BASIC RIGHTS, ALTHOUGH SOME OF HIS OPINIONS DISPLAY AN UNDUE DEFERENCE TO INSTITUTIONS AND AN INSENSITIVITY TO SYSTEMIC FORMS OF DISCRIMINATION

A. Judge Kennedy's Opinions in *Aranda, TOPIC* and *Spangler* Show an Insensitivity to Systemic Discrimination and a Hesitancy to Use the Courts as an Instrument to Correct Damaging Institutional Policies

As several witnesses testified, some of Judge Kennedy's opinions raise a question about his sensitivity to systemic forms of discrimination. Michael Martinez, President of the Hispanic National Bar Association, for example, stated that Judge Kennedy has sometimes given "undue deference . . . to the institutions, without being fully cognizant or appraised of individuals who have not been part of the system, who . . . often times need other people to assist them in solving their problems. . . ." (Tr., 12/16/87, at 268.) Similarly, Antonia Hernandez, president and general counsel of the Mexican American Legal Defense and Educational Fund, expressed a concern about the nominee's opinions dealing with "systemic issues"—that is, "issues covering a group of people." (*Id.* at 262.)

The hearings focused on three principal opinions of Judge Kennedy in which this pattern was evident: *Aranda* v. *J.B. Van Sickle,* 600 F.2d 1267 (9th Cir. 1979), *cert. denied,* 446 U.S. 951 (1980); *Spangler* v. *Pasadena Board of Education,* 611 F.2d 1239 (9th Cir. 1979); and *TOPIC* v. *Circle Realty,* 532 F.2d 1273 (9th Cir.), *cert. denied,* 429 U.S. 859 (1976), *disapproved, Gladstone Realtors* v. *Village of Bellwood,* 441 U.S. 91 (1979).[5]

1. *Aranda* v. *J.B. Van Sickle*

In *Aranda,* a group of Hispanic plaintiffs challenged the at-large elections used by the city of San Fernando, California. The record showed that as of the early 1970's, 50 percent of the city population was Hispanic and 29 percent of the registered voters were Hispanic. Yet since the city's incorporation in 1911, only three Hispanics had ever been elected at large to the five-member city council. In addition, certain Hispanic poll watchers had been harassed by the police and private homes of white citizens had been used as polling places. (600 F.2d at 1268–69.)

The district court had summarily dismissed the complaint, thereby denying the plaintiffs the opportunity to present evidence at trial. A panel of the Ninth Circuit affirmed. In a concurring opinion, Judge Kennedy said that "[a]ssuming that plaintiffs' factual allegations are true, when taken together, they would not permit a reasonable person to infer that the at-large system for electing the

[5] The committee commends the excellent written statement submitted by Antonia Hernandez on behalf of MALDEF, which discussed the opinions authored by Judge Kennedy that have been characterized as both anti- and pro-civil rights.

mayor and city council members is maintained because of in invidious intent." (*Id.* at 1277.) He also indicated, however, that the statistics regarding the placement of polling places "might be sufficient to withstand a summary judgment motion in a lawsuit seeking to have some of the city's polling places located" in the Hispanic community. (*Id* at 1279.)

Several members of the committee queried Judge Kennedy about his concurring opinion. In response to Senator Metzenbaum, for example, the nominee testifed that he wrote a separate opinion because he "felt that there was something wrong in that case." (Tr., 12/15/87, at 23.) He reached the same result as the majority, however, because of

> the insistence by the plaintiffs . . . that they wanted only the one remedy of a district election scheme rather than an at-large election scheme. That is the only remedy they sought.
>
> This is one of the most powerful, one of the most sweeping, one of the most far-reaching kinds of remedies that the federal court can impose on a local system . . . [A]s is expressed in the concurrence, that remedy far exceeded the specific wrongs that had been alleged. I concluded that the remedy sought did not match the violation established. . . . I made it a point to say by implication that there was serious concern that individual rights violations had been established in the record. (*Id.* at 23–24.)

Senator Kennedy and the nominee then had the following exchange:

> Senator KENNEDY. . . . Since you were troubled, . . . why not then let it go to the next stage and let a finding of fact be permitted?
>
> * * * * *
>
> Judge KENNEDY. . . . [B]ecause the attorneys insisted this was all the suit was about, was at large versus district elections.
>
> And I just did not see that as a plausible remedy, as a permissible remedy, given the violations they had established. (*Id.* at 25, 27.)

Senator Kennedy pursued this point further:

> Senator KENNEDY. The concern that I would have and I would think most of those Hispanics would have, is that discrimination today, whether it applies to women or minorities, does not appear on signboards. It is . . . often hidden and . . . if all of these facts were true, that there had been harassment of the poll workers, that there had been the conscious positioning of those polls in white homes that perhaps did not include Hispanics . . . why wouldn't you believe that it would have been wise to let the jury, or judge hear out the facts on that, to make a judgment whether that whole election process and system was sufficient[ly] corrupt and sufficiently discriminatory, where the kind of relief that the petitioner wanted might

be justified, as it has been in certain other kinds of cases where not dissimilar problems have been raised?

* * * * *

Judge KENNEDY. . . . I have indicated that I thought that a complaint would lie for these actions.

I did think, Senator, that because of the insistence of the plaintiffs that they wanted only the at-large election remedy, that a judge would not reasonably conclude . . . that the maintenance of the at-large system was intentionally caused, because I did not think that this evidence did support that inference. (*Id.* at 113–115.)

Senator Metzenbaum suggested that Judge Kennedy could "have indicated in [his] decision what the proper remedy should be . . . or provided for the remedy. . . ." (*Id.* at 25.) And Senator Specter concluded that "[i]t just seems hard to understand the use of summary judgment and the refusal to allow the facts to be submitted to a factfinder in view of the very substantial constitutional issues involved" in *Aranda*. (*Id.* at 223.)

Several witnesses expressed similar views. Nathaniel Colley, a civil rights leader who testified in favor of Judge Kennedy's confirmation, stated, for example, that "both the circumstantial and direct evidence produced by the plaintiffs should have precluded the granting of summary disposition of the case, and that Judge Kennedy should have voted to reverse the judgment." (Written Statement of Nathaniel Colley, at 5.) And as explained by Antonia Hernandez in response to a question from Senator Kennedy:

> [I]n voting rights cases . . . [there are two stages] . . . [Y]ou first go to the stage of establishing liability, and then, after you establish liability at a trial, then you go into the second stage, which is the remedy stage.
>
> By dismissing on a summary motion, he precluded us from even going to court and establishing . . . liability.
>
> Now, as we all know, once you get to court and establish liability, what one pleads as a remedy might not be what one gets. And it is at the remedy stage, as you know, that the judges have the discretion to give less than what one would ask for.
>
> So to say he dismissed it because we only wanted . . . the remedy from going to at large to single member district just doesn't hold. (Tr., 12/16/87, at 256–57.)

Judge Kennedy's concurring opinion in *Aranda* remains troubling in light of the real injustice to Hispanics under the facts of the case. As several witnesses suggested, the nominee's opinion raises a question about his sensitivity to systemic forms of discrimination.

2. *Spangler* v. *Pasadena School Board*

In this case, the Pasadena School Board sought to dissolve the district court's jurisdiction, invoked consistently since 1970, when the city was found to have segregated schools. The district court concluded that jurisdiction should be retained. Judge Kennedy's

majority opinion reversed the district court and ordered that jurisdiction over the school board be terminated.

Under questioning from Senator Specter, Judge Kennedy testified that "we felt that the district having been in good faith compliance for a period of years was entitled to a release of the jurisdiction of the court." (Tr., 12/15/87, at 193.) The following exchange then took place:

> Senator SPECTER. Well, but that is the question. The question is whether the School Board was in compliance. . . . [W]e know that the lower court is in a better position to find the facts, especially questions of intent. And it was a little hard for me to follow the conclusion as a matter of law that the lower court was wrong in the face of those very extensive factual findings.
>
> Judge KENNEDY. Well, we looked at the findings and concluded otherwise. . . . (*Id.* at 193–94.)

Judge Kennedy's opinion in *Spangler,* overruling the findings of the trial judge, again raises a question about his sensitivity to broad forms of discrimination and his willingness to defer to established institutions.

3. *TOPIC* v. *Circle Realty*

This case involved allegations of racial steering under title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act. Judge Kennedy's majority opinion found that under one section of the act, only direct victims of discrimination could sue and that suits were not authorized to vindicate the rights of third parties. Three years later, the Supreme Court ruled, 7 to 2, in an opinion by Justice Powell, that Judge Kennedy's opinion had interpreted the statute incorrectly and that third parties could sue. *Gladstone Realtors* v. *Village of Bellwood, supra.*

Under questioning from Senator Kennedy, the nominee explained the rationale for his decision (Tr., 12/14/87, at 128–130) and said that "[t]he Supreme Court said we were wrong, and I certainly have no quarrel with the decision. I was puzzled by the statute. And so far as the Supreme Court's decision is concerned, I would willingly and fully enforce it." (*Id.* at 129–30.)

Several witnesses expressed concern about Judge Kennedy's opinion in *TOPIC.* Professor Tribe, for example, stated that the opinion was "strikingly restrictive of the class of people to whom the act granted standing to sue." (Tribe written statement at 28.) And Mr. Colley indicated that "Judge Kennedy erred . . . by giving too narrow an interpretation of the statute involved." (Colley written statement, at 3.)

As Senator Kennedy stated, the committee is concerned that the nominee's opinion in this case displays "a rather narrow, cramped, interpretation" of the relevant statute "in an area where there is a good deal of discrimination in our society. . . . " (Tr., 12/14/87, at 130.)

In a total of three instances, the Supreme Court has rejected as too restrictive the views expressed by Judge Kennedy on civil

rights issues.[6] When asked by Senator Kennedy about his approach to construing civil rights statutes, the nominee responded that the civil rights laws "must be generously enforced, or people are going to get hurt." (*Id.* at 131.) Later in that exchange, he indicated that he "did not think those statutes should be interpreted grudgingly." (*Id.* at 135.)

B. Judge Kennedy's Opinions Suggest That He is More Willing To Invoke Judicial Power To Remedy Discrimination Against Individuals

The committee's extensive review of the nominee's judicial record reveals a number of opinions in which Judge Kennedy wrote in favor of civil rights plaintiffs, often in cases involving individual rather than systemic discrimination. These cases include:

- *Flores* v. *Pierce*, 617 F.2d 1386 (9th Cir. 1980). Two Hispanic restaurant owners challenged the delay in receiving their liquor licenses caused by local government officials. Judge Kennedy's majority opinion affirmed the jury findings of intentional discrimination. The opinion stated that "[i]t was shown that the defendant city officials deviated from previous procedural patterns, that they adopted an ad hoc method of decisionmaking without reference to fixed standards, that their decision was based in part on reports that referred to explicit racial characteristics, and that they used stereotypic references to individuals from which the trier of fact could infer an intent to disguise a racial animus." (*Id.* at 1389.)
- *Lynn* v. *Western Gillette, Inc.*, 546 F.2d 1282 (9th Cir. 1977). Judge Kennedy's majority opinion broadly interpreted the time period for claimants to bring suit in sex discrimination cases under Title VII of the Civil Rights Act. He wrote that "if the private right of action is to be effective, it is critical for the aggrieved party to know when the [time] period [for bringing suit] begins to run." (*Id.* at 1285.)
- *NLRB* v. *Apollo Tire Co.*, 604 F.2d 1180 (9 Cir. 1979). Judge Kennedy concurred in a decision finding that undocumented workers were "employees" within the meaning of, and hence were protected by, the NLRA. He wrote that "[i]f the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case." (*Id.* at 1184.)

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[6] In *School Committee of the Town of Burlington, Massachusetts* v. *Dept. of Education of Massachusetts*, 471 U.S. 359 (1985), the Supreme Court unanimously held that the Education of the Handicapped Act permits parents to obtain reimbursement for tuition expenses incurred when they place their children in private schools during the pendency of proceedings to review a challenged education program. In so doing, the Supreme Court rejected the views taken by Judge Kennedy in his opinion in *Mountain View-Los Altos Union High School District* v. *Sharron, B.H.*, 709 F. 2d 28 (9th Cir. 1983.) Similarly, in *Crown, Cork & Seal Co., Inc*, v. *Parker*, 462 U.S. 345 (1983), the Supreme Court unanimously held that the filing of a motion for class certification tolls the statute of limitations for claims of all putative class members. The Court vacated a decision by Judge Kennedy, *Pavlak* v. *Church*, 681 F. 2d 617 (9th Cir. 1982), which had reached the opposite conclusion.

● *James* v. *Ball,* 613 F.2d 180 (9th Cir. 1980), *rev'd,* 451 U.S. 355 (1981). Judge Kennedy's majority opinion invoked the one-person, one-vote principle to strike down as unconstitutional a state statute that limited voting in elections for directors of an agriculture and power district to landowners, even though a large number of the district's users of water and power were not landowners. He wrote that "[t]he rationale for departing from one-person, one-vote" applies under certain conditions "of most narrow dimension. . . ." (*Id.* at 185.)

C. While There is a Basis for Concern, the Over-All Picture that Emerges from Judge Kennedy's Record Is of A Nominee Who Respects the Civil Rights Advances that Have Occurred Thus Far and Who Is Committed to Eradicating Discrimination

The concern about Judge Kennedy's civil rights record was aptly expressed by both Chairman Biden and Senator Kennedy. As articulated by the chairman:

> . . . The concern that I have is that [Judge Kennedy may be] like many prominent, honorable, decent, and intelligent members of, for lack of a better word, the establishment in various communities [who] are never reluctant to remedy an injustice toward an individual, but many times . . . seem reluctant to deal with systemic problems. (Tr., 12/16/87, at 320–21.)

As posited by Senator Kennedy:

> I think the real question . . . [is] whether not only as a nominee, but should you be confirmed, whether you are going to live by those four words that are above the Supreme Court, . . . and that is 'Equal Justice Under Law;' and whether [people] are going to feel, particularly those that have been left out and left behind . . . that in Justice Kennedy that they are going to have someone [who] will not be looking for the technicalities and the narrow and crabbed or pinched view of a particular statute, but be looking . . . to interpreting [the statute] in a way which is going to be sensitive to the basic reasons . . . why that statute was passed. (Tr., 12/15/87, at 122–23.)

These concerns, based on Judge Kennedy's record, must be viewed in the context of Judge Kennedy's testimony as well as by the testimony of several witnesses who have personal knowledge of the nominee. Judge Kennedy testified that "[w]e simply do not have any real freedom if we have discrimination based on race, sex, religion or national origin, and I share that commitment." (Tr., 12/14/87, at 128.) He added:

> Some of the most significant cases in the history of the Court are those in which the Court protected minorities from laws enacted by a majority insensitive to their rights and liberties. Indeed, those are the instances which rights and liberties are most endangered. This is the very protection that the judiciary exists to provide. **The highest duty of a judge is to use the full extent of his or her power**

> **where a minority group or even a single person is being denied the rights and protections of the Constitution.** (Answer to written question No. 5 from Senator Simon; emphasis added.)

When asked to respond to the concerns expressed by Ms. Hernandez, Judge Kennedy stated:

> . . . I have understood for many years that Hispanic people are a vital part of our society and culture, and that their ethnic or minority status should not be used to disadvantage them, either by acts of hostility or of passive indifference.
>
> Indifference to the civil rights of Hispanics, women, and other minorities is unacceptable. Hispanic persons are entitled to civil rights protections, in whatever degree is necessary to ensure that they have each and every one of the rights guaranteed to all Americans. (Answer to written question No. 4 from Senator Biden.)

And with respect to civil rights statutes, Judge Kennedy said that they "should not be interpreted in a grudging, timorous, or unrealistic way to defeat congressional intent or to delay remedies necessary to afford full protection of the law to persons deprived of their rights." (Answer to written question No. 8 from Senator Simon.)

Several witnesses testifed in support of Judge Kennedy's commitment to civil rights. Nathaniel Colley, for example, while disagreeing with several of Judge Kennedy's opinions, stated:

> . . . My sense of confidence arises because I know him very well. I know him to be a very fair man, a man who wishes the best for America and all of its groups, no matter what color, creed or otherwise.
>
> I would say to you that Judge Kennedy has never done or said anything that I know of which would indicate that he harbors any kind of racial or ethnic bias. (Tr., 12/16/87, at 320.)

Similarly, Robert Cartwright, a partner in the San Francisco law firm of Cartwright, Sucherman, Slobudin & Fowler, testified that

> I do not believe . . . that Judge Kennedy is going to turn back the clock on all of the wonderful . . . civil rights progress . . . that we made in this country in the last 50 years. (*Id.* at 308.)

While the criticism of some of Judge Kennedy's civil rights opinions is well-founded, the committee does not detect in the nominee's record any antipathy toward the civil rights of all Americans. And the committee takes Judge Kennedy at his word that over the years, he has come to have a greater sensitivity to all forms of discrimination. (Tr., 12/14/87, at 137.)

II. WHILE SOME WITNESSES RAISED CONCERN ABOUT JUDGE KENNEDY'S APPROACH TO GENDER DISCRIMINATION CLAIMS, THE NOMINEE'S TESTIMONY, PARTICULARLY AS IT RELATES TO THE SCRUTINY OF SUCH CLAIMS UNDER THE FOURTEENTH AMENDMENT, SUGGESTS THAT HE HAS BECOME INCREASINGLY SENSITIVE AND OPENMINDED

A. Judge Kennedy's Judicial Record Raises a Concern About His Sensitivity to Claims Under Title VII for Gender Discrimination in the Workplace

Some witnesses, particularly Molly Yard, president of the National Organization for Women, and Susan Deller Ross, professor of law at the Georgetown University Law Center, who appeared on behalf of the NOW Legal Defense and Education Fund, identified two cases that raise a concern about Judge Kennedy's sensitivity to claims under title VII for gender discrimination in the workplace: *AFSCME* v. *State of Washington,* 770 F.2d 1401 (9th Cir. 1985), and *Gerdom* v. *Continental Airlines, Inc.* 692 F.2d 602 (9th Cir. 1982) (en banc), *cert. dismissed,* 460 U.S. 1074 (1983).

1. *AFSCME* v. *State of Washington*

In *AFSCME,* Judge Kennedy wrote the Nation's first major appellate decision holding that title VII does not require equal pay for women doing jobs that are not identical but are of "comparable worth" to higher-paid job categories dominated by men. As Professor Ross and Ms. Yard point out in their written statements, the district court found that

> . . . the evidence shows the discrimination is pervasive and intentional and is still being practiced by the State; and that the State is adhering to a practice of sex discrimination in violation of the terms of Title VII with full knowledge of, and indifference to, its effect. . . ." (578 F. Supp. at 871.)

Judge Kennedy's majority opinion reversed the district court, finding, in part, that "[a]bsent the showing of discriminatory motive, which has not been made here, the law does not permit the Federal courts to interfere in the market-based system for the compensation of [the State's] employees." (770 F.2d at 1408.) Judge Kennedy reiterated this point in his testimony, stating that "[w]e did not think . . . that there was a shred of evidence to show that the State had deliberately maintained that pay scale difference in order to discriminate against women." (Tr., 12/15/87, at 32.)

Judge Kennedy's opinion in *AFSCME* raises the same concern that was present with respect to his opinion in *Spangler:* that he did not adequately defer to the evidentiary record developed by the district court. As Senator Metzenbaum stated, "the district court had already found that the state . . . knew for several years that it was perpetuating a discriminatory pay system." (*Id.* at 32–33.) And as pointed out by Senator Specter, "I question . . . your coming to a conclusion as a matter of law which overturns very strong findings of fact by a lower court in the civil rights area." (*Id.* at 196.)

2. Gerdom v. Continental Airlines

At issue in this case was a Continental Airlines policy requiring all "flight hostesses"—a position held only by women—to comply with certain weight requirements as a condition of their employment. The airline did not enforce similar requirements for an exclusively male category of employees, who also served passengers in-flight (albeit under different job titles). As described by the court, Continental's stated purpose of the weight program was "to create the public image of an airline which offered passengers service by thin, attractive women, whom executives referred to as Continental's 'girls.' " (692 F.2d at 604.)

Hearing the case *en banc,* a majority of the Ninth Circuit held that the airlines's policy was discriminatory on its face, stating that the "exclusively female classification in this case typifies the then prevailing pattern in the airline industry of restricting job opportunities and imposing special conditions on the basis of gender stereotypes." (*Id.* at 606.) The majority also noted the harmful effects of "occupational clinches," (*id.* at 607), and specifically rejected Continental's proffered justification that featuring attractive female cabin attendants was necessary in order to compete with other airlines. (*Id.* at 609.)

Judge Kennedy joined the dissent in *Gerdom,* which found that Continental had met its burden of articulating some legitimate, nondiscriminatory reason for the difference in treatment. The dissent argued that Continental had introduced evidence "that the degree of customer contact with flight hostesses dictated that they maintain a more attractive personal appearance." (*Id.* at 614.) In response to a written question, Judge Kennedy said that "[t]he dissenters did not suggest, and I would not have subscribed to a suggestion, that custom and tradition could form the basis for legitimate employment criteria if those criteria were used as a pretext to discriminate on the basis of sex." (Answer to written question No. 10 from Senator Simon.)

While Judge Kennedy did not author an opinion in *Gerdom,* his joining the dissent—which treated as dispositive the preferences and prejudices of customers—raises concerns about his sensitivity to stereotypical notions about the roles of men and women and the history of women's exclusion from a wide spectrum of employment opportunities.

B. Judge Kennedy Testified that He is "Committed to Enforcing Congressional Policy" to Eliminate Discrimination Against Women

Both *AFSCME* and *Gerdom* raise a concern about Judge Kennedy's sensitivity to claims under title VII for gender discrimination in the workplace. At the same time, however, Judge Kennedy testified in support of congressional policy to eliminate that discrimination:

> I am absolutely committed to enforcing congressional policy to eliminate barriers against discrimination against women, particularly in employment or in the market place or in any other area where it is presented to me.

> We do not have a free society when those barriers exist. We do not have a free society if women cannot command pay that is calculated without reference to the fact that they are of a particular sex. (Tr., 12/15/87, at 34.)

C. In His Testimony, Judge Kennedy Agreed that the Supreme Court Has Moved in the Proper Direction in Enforcing Gender Equality Under the 14th Amendment

Under existing law, classifications challenged as denying equal protection are generally sustained if they rationally further a legitimate governmental interest. This "rational basis" or "rational relationship" test is the most deferential of the three standards utilized by the Supreme Court. Classifications based on gender and involving a number of important but not constitutionally fundamental interests trigger "intermediate scrutiny;" this "middle-tiered" analysis has been forumlated in a number of ways, one of which is to ask whether the classification serves important governmental objectives and is substantially related to achievement of those objectives. Finally, "strict scrutiny"—the highest (that is, least deferential) level of review to which a legislative classification is subjected—is invoked when a classification disadvantages what is referred to as a "suspect class" (such as race) or interferes with a "fundamental right."

In a revealing exchange with Senator DeConcini, Judge Kennedy provided some insight as to how he would resolve claims for gender discrimination under the Equal Protection Clause of the 14th Amendment:

> Senator DECONCINI. . . . I understand that the Court has developed what is popularly known as . . . heightened scrutiny . . . or intermediate scrutiny for this type of discrimination case brought before the Court.
>
> Judge KENNEDY. That is my understanding of the case law, and, really, the Court, as an institution, the judicial system generally has not had the historical experience with gender discrimination cases that we have had with racial discrimination cases.
>
> And so the law there really seems to me in a state of evolution at this point, and it is going to take more cases for us **to ascertain whether or not the heightened scrutiny standard is sufficient to protect the rights of women, or whether or not the strict standard should be adopted.**
>
> Senator DECONCINI. There is no question in your mind . . . that the judges recognize those standards, and you subscribe to that in general principle . . .?
>
> Judge KENNEDY. Well, it may be that in resolving one of those cases. I would give attention to Justice Marshall's standard [7] and make a determination whether or not

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[7] In Justice Marshall's view,

> [a] principled reading of what this Court has done reveals that it has applied a **spectrum of standing** in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum comprehends variations in degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal impor-

Continued

that is a better expression than the three-tiers standard that the Court seems to use, although it seems to me, on analysis, those are very close.

* * * * *

Senator DECONCINI. You do not have some personal hostility towards the way the court is proceeding in this particular area of gender discrimination as it relates to the Equal Protection Clause?

Judge KENNEDY. The cases seem to me a plausible and rational way to begin implementing the Equal Protection Clause. (Tr., 12/14/87, at 169–171; emphasis added.)

Judge Kennedy's caseload on the Ninth Circuit has not provided him with an opportunity to study in depth the question of gender discrimination under the Equal Protection Clause of the 14th Amendment. His testimony confirms that his views on this issue are still evolving. That testimony also suggests, however, that Judge Kennedy seems to embrace the Supreme Court's decisions establishing that gender discrimination claims under the 14th Amendment require more rigorous review than economic or regulatory-based claims. He indicated that the Supreme Court may not have gone far enough to protect women, and that the strict scrutiny standard may be necessary if the intermediate standard of scrutiny is found to be inadequate. Importantly, Judge Kennedy did not indicate or suggest that the lowest, or most deferential, standard—the rational basis or reasonable basis test—might be sufficient in evaluating gender discrimination claims.

III. JUDGE KENNEDY'S TESTIMONY ON THE STANDARDS OF SCRUTINY APPLICABLE UNDER THE 14TH AMENDMENT WAS POSITIVE AND CONSISTENT WITH PREVAILING SUPREME COURT DOCTRINE

In his testimony, Judge Kennedy was unequivocal in his belief that the Equal Protection Clause applies to all persons:

Senator DECONCINI. . . . Would you agree, first of all, that the Equal Protection Clause applies to all persons?

Judge KENNEDY. Yes, the amendment, by its terms, of course, includes persons, and I think was very deliberately drafted in that respect. (Tr. 12/14/87, at 167.)

* * * * *

Senator SPECTER. Is there any question in your mind about the Equal Protection Clause applying beyond blacks to women, to aliens, to indigents, to mentally retarded?

Judge KENNEDY. No. In fact, once again, the Framers could have drafted the amendment so that it applied to blacks only, but they did not. They used the word "person." (Tr., 12/15/87, at 228–29.)

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tance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *(San Antonio Ind. School District* v. *Rodriguez,* 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) (emphasis added).)

In an exchange with Senator DeConcini, Judge Kennedy also provided some insight into his views generally of the three-tiered standards upon which a majority of the Court has come to rely. He observed:

> [O]ne beneficial feature of a tier standard is that the court makes . . . clear the substantive weight that it is giving to the particular claim before it, and the court can then be criticized, or vindicated, as the case may be.
>
> It sets the standards. And the lower courts have a certain amount of guidance. The Supreme Court is in the difficult position of hearing 150 cases a year, and in doing so, providing the requisite doctrinal guidance and supervision of the lower courts. (Tr., 12/14/87, at 173–74.)

IV. WHILE THE COMMITTEE WOULD HAVE PREFERRED THAT JUDGE KENNEDY'S REFLECTIONS WITH RESPECT TO PRIVATE CLUBS HAD EVOLVED MORE RAPIDLY AND WITH AN APPRECIATION THAT RESTRICTIVE MEMBERSHIP POLICIES ARE DISCRIMINATORY, HIS ACTIONS AND TESTIMONY DEMONSTRATE AN INCREASED UNDERSTANDING OF THE ISSUE AND ITS SOCIETAL IMPORTANCE

The committee extensively examined Judge Kennedy's former membership in private clubs with restrictive membership policies because of the role that such clubs play in the efforts by women and other traditionally excluded groups to enter fully into the economic and social fabric of society and in light of the prohibition on membership in discriminatory clubs set forth in the commentary to Canon 2 of the ABA's Code of Judicial Conduct. The nominee's testimony, as well as the testimony of several witnesses, demonstrate that his understanding of this issue and its societal importance has increased over time.

A. The Factual Background to Judge Kennedy's Prior Club Memberships

There are three clubs to which Judge Kennedy belonged from 1958 to November 1987 that at one time or another during his membership had restrictive membership policies: the Olympic Club (San Francisco); the Sutter Club (Sacramento); and the Del Paso Country Club (Sacramento).

1. The Olympic Club

Judge Kennedy was a member of the Olympic Club from October 22, 1961, to November 13, 1987. When he joined, the club's bylaws restricted membership to "white males." In 1968, the club lifted this restriction and has since admitted Asians and Hispanics. At present, however, there are no black members and there have been none since the "white male" restriction was removed. Women remain excluded from club membership.

On August 7, 1987, Judge Kennedy wrote a letter to the club expressing concern about the membership policies. He said, in part, that "any arguments based on the club's legal position are really beside the point. The fact is that constitutional and public morality

make race or sex distinctions unacceptable for membership in a club that occupies the position that the Olympic Club does." In this same letter, the nominee referred to a magazine article about the club and its "historic, egalitarian ideals." He said that "the 200th year of our Constitution is high time for the club to renew its commitment to those ideals and to take prompt action to make them a reality."

In November, after a majority of the club's members voted against a plan that would have admitted women, Judge Kennedy resigned.

2. The Sutter Club

Judge Kennedy belonged to the Sutter Club from December 10, 1963, to October 26, 1980. Women were excluded from the club as a matter of practice. Judge Kennedy reported in his questionnaire that "after advising the club of my concerns about its practices, I resigned in 1980." (Committee Questionnaire, at 48.)

Judge Kennedy testified that, in contrast to the other clubs, he "was always seen there [at the Sutter Club] as a judge when I went there. . . . I . . . felt that my membership there was one where I was there only as a judge, and that it was inappropriate for me to belong." (Tr., 12/14/87, at 141-42.)

3. The Del Paso Country Club

The nominee was a full member of this club from 1963 to October 22, 1987. According to Judge Kennedy, the club "does not have a policy or practice of restricting the membership of minorities or women. However, the membership reflects few women or minority members." (Committee Questionnaire, at 48.) The committee's investigation determined that currently there are some women members of the club but no black members.

Judge Kennedy reported in his questionnaire that until the mid-1970's, the bylaws used masculine pronouns, which raised the inference that female membership was discouraged. He said that he "expressed . . . displeasure with such implied restrictions" and that the bylaws were eventually changed. (*Id.*).

The nominee described his resignation as follows:

> While, in my view, any perceived discrimination against women has decreased over the years since the bylaws were amended, I resigned from the club in October of this year to prevent my membership from becoming an issue. (*Id.*)

B. The ABA Code of Judicial Conduct and Judge Kennedy's Prior Club Memberships

The commentary to Canon 2 of the ABA's Code of Judicial Conduct provides that "it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin."

In his questionnaire, Judge Kennedy said the following about Canon 2:

> "Invidious discrimination" suggests that the exclusion of particular individuals on the basis of their sex, race, religion or national origin is intended to impose a stigma on

such persons. As far as I am aware, none of these policies or practices were the result of ill-will. I recognize nonetheless that real harm can result from membership exclusion regardless of its purported justification. Therefore, I have supported efforts to broaden the membership of clubs to which I have belonged as a circuit judge and have resigned when those efforts have appeared to be unlikely to succeed. (Committee questionnaire, at 50.)

C. Judge Kennedy Testified that He Has "Tried to Become More Sensitive to the Existence of Subtle Barriers to the Advancement of Women and of Minorities in Society"

In an extensive series of colloquies with Senator Kennedy, the nominee elaborated on his club memberships, the commentary to Canon 2 and his evolving views on this issue. On the one hand, Judge Kennedy reiterated his view that "none of these clubs practiced invidious discrimination." (Tr., 12/14/87, at 140.) On the other hand, he recognized the pain and difficulties encountered by women and minorities who must face exclusionary membership practices.

Particularly informative is the nominee's response to Senator Kennedy's question of "why did it take so long" for him to resign from the Olympic Club. Judge Kennedy responded:

> Discrimination comes from several sources. Sometimes it is active hostility. And sometimes it is just insensitivity and indifference.
>
> **And over the years, I have tried to become more sensitive to the existence of subtle barriers to the advancement of women and of minorities in society. And this was an issue on which I was continuing to educate myself.**
>
> I want to see a society in which young women who are professionals . . . have the same opportunity to . . . join a club where they meet other professionals. (Tr., 12/14/87, at 137; emphasis added.)

Also informative is this exchange:

> Senator KENNEDY. But in terms of stigmatizing various groups, since this is a prestigious club, . . . the fact that women either cannot belong to it, or minorities, respectively, don't, . . . does that not serve so as to form some kind of stigma in terms of those individuals?
>
> Judge KENNEDY. There is no question that the injury and the hurt and the personal hurt can be there, regardless of the motive.
>
> * * * * *
>
> It is most unfortunate, almost Dickensian, for a group of lawyers to meet at 11:30 and to settle a case and to celebrate and say, well, let's all go to the club. And suddenly there is a silence, and they cannot go because there is a woman there. That is stigmatizing. That is inappropriate. (*Id.* at 140–41, 143.)

On the next day, in response to an additional question from Senator Kennedy, the nominee said:

> . . . [I]t is clear, to me, that if a discriminatory barrier exists for too long, if it is visible, if it is hurtful, and if it is condoned, that the person who condones it can be charged with invidious discrimination. I would concede that. (Tr., 12/15/87, at 118.)

D. Judge Kennedy's Testimony and the Testimony of Several Key Witnesses Demonstrate that the Nominee's Sensitivity to Club Memberships and His Awareness of the Issue's Importance Have Increased Over Time

With respect to Judge Kennedy's prior club memberships, the committee places great weight on the testimony of Nathaniel Colley and Dean Susan Praeger. Dean Praeger stated:

> . . . I wish that his [Judge Kennedy's] reflections with respect to private clubs had evolved more rapidly and with an appreciation that this form of discrimination is indeed invidious. Nevertheless, I see in Anthony Kennedy's actions significant understanding of the issue and its societal importance. The unfortunate reality is that a number of powerful men in this society, men of the full spectrum of political viewpoints, have chosen to not put themselves on the line on this issue, and have continued their membership in these discriminatory institutions which pride themselves on excluding whole classes of people. Knowing Sacramento as I do, I place a great deal of positive weight on [Judge] Kennedy's 1980 decision to leave the Sutter Club. (Praeger written statement, at 2.)

Mr. Colley echoed a similar theme:

> . . . [L]ong before he was a candidate for the . . . [Supreme Court] he did, in fact, resign from the Sutter Club because of its discrimination against women. That seems to me a great plus because we have to realize that this business of not joining clubs which discriminate is a part of a new enlightenment. This hasn't always been the view in America.
>
> * * * * *
>
> I also know from personal experience that he was uncomfortable in any situation where he thought discrimination might exist, but he was not as sensitive earlier on as he should have been. (Tr., 12/16/87, at 313, 321.)

As these witnesses have highlighted, Judge Kennedy did in fact resign from the Sutter Club in 1980. Furthermore, he took action to try to change the policies of the Olympic Club, noting this past summer that "constitutional and public morality make race or sex distinctions unacceptable for membership" in the club. Significantly, Judge Kennedy no longer belongs to any club with a restrictive membership policy. And the nominee stressed in his testimony that he has over the years sought to become increasingly sensitive to subtle barriers that impede the advancement of women and mi-

norities. Indeed, his testimony suggests that he has made progress in understanding that actions that are "enduring, visible, hurtful and condoned"—even if not the result of a hostile animus—can be a real problem. As Mr. Colley testified:

> Membership in such clubs in this day and age in America is suspect, but we all too often forget that the present attitude has not always prevailed.
>
> . . . Lifting the veil of ignorance and prejudice from the eyes of a people is a slow and painful task. Some who truly desire to see racism banished from our society use the shock effect of immediate resignation from such clubs, others remain within and use their influence in an effort to persuade these groups to enter the new age of enlightenment. The vast majority of people will take no action at all.
>
> I fail to see how Judge Kennedy's past club affiliations disqualify him from membership on the U.S. Supreme Court. He has done the honorable thing with respect to each of them. He fought for internal change and when he realized that he would not succeed he resigned. (Colley written statement, at 5–6.)

The issue of a judicial nominee's membership in clubs and other organizations that discriminate against women or minority groups is not a new one for this committee. This issue arises with some frequency and sometimes presents perplexing problems. It is troubling that it took so long for Judge Kennedy's awareness of this issue to rise to the level that impelled him to take action. Looking beyond the timing of his action, however, Judge Kennedy's conduct may set a positive example for other judges and judicial nominees to the extent that his ultimate decision to resign reflects an awareness that Federal judges should not split hairs on the question of the "invidiousness" of an organization's membership policies or practices, and should resolve doubts against continued membership in order to avoid even the appearance of association with bias.

* * * * * * *

There are a number of significant areas of concern arising from some of Judge Kennedy's decisions on the rights of women and minorities. As Dean Praeger testified, the nominee "places a lot of emphasis on the motives that relate to the discrimination" and he "is not at this point as appreciative as I might like him to be about the subtleties of discrimination in this culture. . . ." (Tr., 12/16/87, at 232.) The committee explored these concerns with Judge Kennedy and with the public witnesses. The depth of those concerns is illustrated, in part, by the fact that those witnesses opposing Judge Kennedy's confirmation have taken their position largely because of problems they see in his civil rights record. These issues warrant careful attention and the committee has examined them in depth.

In the final analysis, the committee is encouraged by much of the testimony during the hearings. The nominee's testimony about the scrutiny applicable to gender discrimination claims under the 14th Amendment was particularly enlightening, for example, and suggests that he harbors no hostile animus to a society in which

men and women have equal rights. Furthermore, as Professor Tribe stated with respect to Judge Kennedy's testimony about some of his decisions:

> . . . I hear the voice of someone who is saying, perhaps I have been, at times, a bit narrow in my reading of these [civil rights] statutes. This is not someone with a fixed commitment to a particular grudging view of the law. This is someone who is 51 years old, who I think is capable of development. . . . (Tr., 12/16/87, at 112–13.)

In response to a question from Chairman Biden, Dean Praeger added:

> I do think that he is a person who has a deep respect for the advancement of the law thus far . . . , and I do not think we are going to see any backtracking on where we are.
>
> * * * * * * *
>
> And this is where I come back in my own thinking about this to his qualities of studiousness and deep interest in the law and genuine, I think, openness.
>
> This is a person who . . . is going to keep thinking over time, and reevaluating. And what I came down to in these last seven months is that that was the quality that I was looking for the most. (*Id.* at 232–33.)

And as Nathaniel Colley concluded about the impact of the hearing process on Judge Kennedy:

> I would tell you that Judge Kennedy is a grown man, but he is a growing man. And I have no doubt that as he proceeds through life, he now knows how important it is to be more sensitive to the issues that now worry you. (*Id.* at 322.)

PART FIVE: JUDGE KENNEDY'S POSITION ON OTHER SIGNIFICANT ISSUES

I. JUDGE KENNEDY'S CRIMINAL LAW RECORD IS GENERALLY MODERATE AND BALANCED

A. The Nominee's Judicial Record in Criminal Law Cases Is Devoid of Any Broad Ideological Bias or Agenda

During his tenure on the Ninth Circuit, Judge Kennedy has written more opinions in the criminal law area than in any other. After its extensive review of those opinions, the committee has found that the nominee's judicial record in the criminal law area is quite balanced. As aptly summarized by Henry Scott Wallace, legislative director of the National Association of Criminal Defense Lawyers:

> In the the area of criminal law, Judge Kennedy may be characterized as a moderate conservative . . . [His approach to cases is characterized by] the apparent lack of

any broad ideological bias or agenda. (Written statement of Henry Scott Wallace, at 2.)

As Senator Leahy stated, a review of Judge Kennedy's criminal law record shows that he has "ruled for the defendants in about a third of the criminal cases" and that he has heard and has ruled "for the government in about two-thirds of the cases." (Tr., 12/15/87, at 136.) Specifically, the committee's review indicates that in 35 of Judge Kennedy's 126 criminal law cases, he reversed convictions or otherwise sided with the defendants; in approximately 10 of those cases, he voted in favor of the rights of the defendant while the majority of judges on the panel voted to affirm the defendant's conviction. In 18 additional cases, Judge Kennedy sided with the defendant on at least one significant issue. As Mr. Wallace recounted, "[d]uring his tenure on the Ninth Circuit, he has reversed 30 percent of the criminal convictions he has reviewed, compared with a national average of 12 percent." (Wallace written statement, at 2.)

This balanced record would appear to explain the high marks Judge Kennedy received from witnesses occupying sharply different positions in the criminal law field. On the one hand, the National Association of Criminal Defense Lawyers, while not taking a final position on the nomination, testified through Mr. Wallace that Judge Kennedy's confrontation clause cares "are very sensitive . . . to the right of cross-examination, and to giving real substance to it . . ." (Tr., 12/16/87, at 291.) On the other hand, Jerald Vaughn, testifying on behalf of the International Association of Chiefs of Police, stated that Judge Kennedy "will fairly and evenly adjudicate the criminal matters coming before him, that he will fairly and consistently interpret the law, and that he will, as much as humanly possible, balance the rights of victims, the rights of the accused, and the rights of the citizens of our great nation to live a crime free life." (Written statement of Jerald Vaughn, at 2.)

B. Judge Kennedy Views the Landmark Criminal Procedure Decisions in Generally Pragmatic Terms

At several points during his testimony, Judge Kennedy emphasized the pragmatic nature of the principal Supreme Court decisions in the area of criminal procedure. An exchange with Senator Thurmond illustrates this view:

> Senator THURMOND. Judge Kennedy, 20 years have passed since the *Miranda* v. *Arizona* [384 U.S. 436 (1966)] decision which defined the parameters of police conduct for interrogating suspects in custody.
>
> Since this decision, the Supreme Court has limited the scope of *Miranda* violations in some cases.
>
> Do you feel that the efforts and comments of top law enforcement officers throughout the country have had any effect on the Court's views, and what is your general view concerning the warnings this decision requires?
>
> Judge KENNEDY. I cannot point to page and verse to show that the comments of law enforcement officials have had a specific influence, but it seems to me that they should. **The Court must recognize that these rules are**

> **preventive rules imposed by the Court in order to enforce constitutional guarantees, and that they have a pragmatic purpose, and if the rules are not working they should be changed.** (Tr., 12/14/87, at 116–17; emphasis added.)

In response to a question from Senator Hatch, Judge Kennedy reiterated this view: "Now my view of interpreting these rules is that they should be pragmatic. They should be workable." (*Id.* at 158.) And under questioning from Senator Specter, he added: "[W]e have paid a heavy cost for imposing those rules [in the Court's criminal procedure cases] on the criminal system; . . . they seem to be part of our constitutional system now; and I think a very strong argument would have to be mounted in order to withdraw those decisions." (Tr., 12/15/87, at 177.)

With respect to the *Miranda* rule in particular, Judge Kennedy and Senator Leahy had the following exchange:

> Senator LEAHY. . . . How do you feel about *Miranda*?
>
> Judge KENNEDY. . . . The *Miranda* rule, it seems to me, again, we have paid the major price by installing it.
>
> We have educated law enforcement officers and prosecutors all over the country, and it has become almost part of the criminal [justice system] folklore.
>
> Senator LEAHY. And you do not have any problem with that now?
>
> Judge KENNEDY. Well, I think that since it is established, it is entitled to great respect.
>
> * * * * *
>
> It was a sweeping rule, sweeping rule. It wrought almost a revolution.
>
> And it is not clear to me that it necessarily followed from the words of the Constitution. And yet it is in place now, and I think it is entitled to great respect.
>
> * * * * *
>
> Senator LEAHY. . . . [D]o you agree that defendants should be warned of their right to counsel and their right to free counsel if they cannot afford it?
>
> Judge KENNEDY. That, of course, is the law and I know of no strong argument for overruling the law that is now in place.
>
> Senator LEAHY. And you agree with that right?
>
> Judge KENNEDY. Well, I don't want to commit myself that I wouldn't reexamine it, but I think it would take a strong argument to require me to change it. (Tr., 12/15/87, at 141–42, 161–62.)

With respect to the exclusionary rule, Judge Kennedy testified that "it is a workable part of the criminal system . . . [i]f it is administered in a pragmatic and reasonable way." (*Id.* at 138.) He added that "Fourth Amendment principles are basic liberties, but they should not be synonymous with a doctrine of such abstraction that it cannot be implemented in a practical way." (Response to written question No. 2 from Senator Biden.)

It should be made clear that Judge Kennedy did not create, or even endorse, the so-called "good faith exception" to the exclusionary rule in his dissent in *United States* v. *Leon,* No. 82-1093 (9th, Cir., Jan. 19, 1983) (*per curiam,* unpublished), *rev'd,* 468 U.S. 897 (1984), as some have stated.[8] In that case, the Government did indeed ask the Ninth Circuit to recognize an exception to the exclusionary rule where the police relied in good faith upon a warrant later determined to be invalid. The court declined this invitation and Judge Kennedy wrote a brief dissent—in which he did not find it necessary to discuss any exception to the exclusionary rule, because he found the search warrant valid. In reversing the Ninth circuit, the Supreme Court adopted the Government's position, not Judge Kennedy's.

Judge Kennedy did, however, address the good-faith issue in *United States* v. *Harvey,* 711 F.2d 144 (9th Cir. 1983), suggesting that since the purpose of the exclusionary rule is to deter improper police conduct, the "rule is torn from its pragmatic mooring . . . [if it is invoked where the police officer] acted not only in good faith but also with probable cause under exigent circumstances." (*Id.* at 144.) Judge Kennedy reiterated this point during the hearings:

> The purposes are a deterrent purpose. The purpose of the exclusionary rule is to advise law enforcement officers in advance that if they do not follow the rules of the Fourth Amendment, the evidence they seize is not going to be usable.
>
> Now if the rule goes beyond that point, and police officer in all good faith, after studying the rule, makes a snap decision that a warrant is valid, or a considered decision that a warrant is valid, then I think the system ought to give some recognition to that reasonable exercise of judgment on his part. (Tr., 12/15/87, at 139.)

Judge Kennedy was careful to caution, in response to a question from Senator Heflin, that "you must be very careful to ensure that by the exception you do not swallow the rule." (Tr., 12/14/87, at 205-06.)

As to whether the exclusionary rule could be abolished altogether, Judge Kennedy indicated "I am aware that some have argued that alternative means for ensuring compliance with the Fourth Amendment could be substituted in place of the exclusionary rule, but I know of no precise proposal submitted by either Congress or the courts to accomplish this." (Response to written question No. 1 from Senator Biden.)

With respect to the sixth amendment right to counsel, Judge Kennedy indicated that he accepts *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and that he "know[s] of no really substantial advocacy for its change." (Tr., 12/15/87, at 140-41.)

C. Judge Kennedy Has Taken No Position on the Constitutionality of the Death Penalty

Judge Kennedy testified about the death penalty in an exchange with Senator Heflin:

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[8] Judge Kennedy has never himself claimed authorship of the good-faith exception in *Leon.*

Senator HEFLIN. Let me ask you about the death penalty. If you believe that the death penalty is constitutional, and some of the speeches you have made indicate that you believe that it is, what safeguards do you think are necessary to prevent the use of the death penalty in a discriminatory manner?

Judge KENNEDY. I, at the outset, Senator, would like to underscore that **I have not committed myself as to the constitutionality of the death penalty. I have committed that if it is found to be constitutional it should be enforced.**

With reference to its being used in a discriminatory manner, there are at least two safeguards. The first is that the legislature itself defines the category of crimes that deserve the ultimate punishment, and the second is that courts develop, articulate, pronounce rules for instructions to the jury so that the jury's decision is properly channeled. You know better than I because of your experience in the trial courts, Senator, the tremendous power of that jury, and juries simply must be given clear guidelines so that they can apply the death penalty on a consistent basis.

It is not clear to me that under the existing law that requisite has been satisfied in some of the cases that I have reviewed. On the other hand, I recognize the difficulty in formulating these standards that I so blithely recommend. (Tr., 12/14/87, at 212–13; emphasis added.)

Judge Kennedy also indicated that it was not clear to him whether the constitutionality of the death penalty is well settled: "These decisions are very close. Some Justices have indicated that it is unconstitutional, and I simply think that I should not take a specific position on a constitutional debate of ongoing dimension." (Tr., 12/15/87, at 208.)

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Judge Kennedy's record in the criminal law area was aptly summarized by Senator Thurmond:

> Generally, the opinions written by Judge Kennedy take a law-and-order position. However, Judge Kennedy has made it clear that if law enforcement officers overstep legal bounds, he will not hesitate to limit overreaching.
>
> While the constitutional rights of criminal defendants must be protected, Judge Kennedy will not ignore the rights of victims or law-abiding citizens.
>
> I am confident that he will take a practical, commonsense approach to criminal cases, protecting the constitutional rights of criminal defendants, but upholding the right of society to be protected from those who commit criminal wrongdoings. (Tr., 12/14/87, at 35.)

II. JUDGE KENNEDY'S RECORD SUGGESTS THAT HE RESPECTS ESTABLISHED FIRST AMENDMENT VALUES

Judge Kennedy's judicial record and his testimony before the committee suggest that he respects established First Amendment values. The following exchange with Senator Hatch illustrates this point:

> Senator HATCH. . . . Few provisions of the Constitution are more important to Americans and our way of life than the free speech guarantees of our Constitution, our First Amendment. . . . [W]hat is your view of the importance of the speech clause and its role in our society?
>
> Judge KENNEDY. The First Amendment may be first, we are not sure, because the Framers thought of it as the most important. It applied not just to political speech, although that is clearly one of its purposes, and in that respect it ensures the dialogue that is necessary for the continuance of the democratic process. **But it applies, really, to all ways in which we express ourselves as persons. It applies to dance and to art and to music, and these features of our freedom are to many people as important or more important than political discussions or searching for philosophical truth, and the First Amendment covers all of these forms.**
>
> Now, of course, the First Amendment protects also the press. . . . But the press is not monolithic. . . . [Small] papers simply must have the protection of the First Amendment if they are to be vigorous in reporting matters of interest to their readers insofar as local [news] is concerned, and they vitally need the protection of the First Amendment. . . . (Tr., 12/14/87, at 152–53; emphasis added.)

Some of Judge Kennedy's opinions demonstrate his respect for a strong First Amendment. In *Goldblum* v. *NBC*, 584 F.2d 904 (9th Cir. 1979), for example, a subject of a so-called "docu-drama" sought to enjoin its broadcast by NBC. The trial court ordered the network to submit the film to the court before its scheduled broadcast. Judge Kennedy's majority opinion ruled that this order was an unconstitutional prior restraint, noting:

> It is a fundamental principle of the First Amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place. . . . The government has been prohibited from interfering with the editorial process by entering the composing room to give directives as to the content of expression. . . . The district court proceedings here intervened in the editorial process by ordering an official of the broadcasting company to produce a film just before its scheduled broadcast so that it could be examined for inaccuracies. **A procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech.** (584 F. 2d at 907; emphasis added.)

As summarized by Senator Hatch: "In my mind it is significant that the courts, too, have sometimes forgotten to protect the Constitution's prior restraint doctrine. Fortunately, other courts are available to correct these errors and that was a perfect illustration." (Tr., 12/14/87, at 154–55.)

In *CBS* v. *U.S. District Court for the Central District of California,* 765 F.2d 823 (9th Cir. 1985), Judge Kennedy's majority opinion ordered the release of certain post-conviction proceeding documents to CBS. He wrote that "we begin with the presumption that the public and the press have a right of access to criminal proceedings and documents filed therein." (765 F.2d at 826.)

Judge Kennedy also testified on the so-called "clear and present danger" test. The modern formulation of that test is in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969), in which the Supreme Court held that speech advocating violence or lawbreaking could be forbidden only if such speech called for, and would probably produce, "imminent lawless action." The following exchange with Senator Specter revealed Judge Kennedy's views on this issue:

> Senator SPECTER. . . . [I]s there any question in your mind about the propriety of the longstanding rule in the Supreme Court of the United States about the clear and present danger test . . . ?
>
> Judge KENNEDY. I am not sure that the clear and present danger test is a full description of the full protection that the Court gives to freedom of speech. I think *Brandenburg* goes a little further than the clear and present danger test.
>
> Senator SPECTER. So you have the clear and present danger test, plus *Brandenburg versus Ohio*——
>
> Judge KENNEDY. Yes.
>
> Senator SPECTER. —and *Hess versus Indiana,* and you agree with that statement of the——
>
> Judge KENNEDY. I know of no substantial, responsible argument which would require the overruling of that precedent. (Tr., 12/15/87, at 229; emphasis added.) [9]

III. JUDGE KENNEDY HAS TAKEN A CAUTIOUS AND MODERATE APPROACH TO SEPARATION OF POWERS ISSUES

A. Judge Kennedy Views Separation of Powers as a Principal Structural Element in the Constitution

In several speeches, Judge Kennedy has identified separation of powers as one of the four "structural elements in the Constitution." (*See, e.g.,* Untitled Speech, Sacramento Rotary Club, October 15, 1987, at 4.)[10] According to Judge Kennedy:

> Separation of powers, the rule that there is an executive, legislative and judicial branch, is often thought of as a re-

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[9] Judge Kennedy also cited the *Brandenburg* decision without any criticism in his opinion in *United States* v. *Freeman,* 761 F.2d 549 (9th Cir. 1985), *cert. denied,* —— U.S. ——, 106 S. Ct. 1982 (1986).

[10] The other three structural elements he identified are "checks and balances, judicial review and federalism." (Rotary Club speech, at 4.)

> straint; but in reality it is the incentive and the force for the independent exercise of power. (*Id.*)

One of Judge Kennedy's most recognized opinions is *Chadha* v. *INS*, 634 F.2d 408 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983), in which his majority opinion held that the one-house legislative veto violated the separation of powers doctrine. The nominee's scholarly opinion found that the doctrine serves two purposes, which relate to the emphasis in his speeches on it being a structural element in the Constitution. First, he wrote that "it prevent[s] an unnecessary and therefore dangerous concentration of power in one branch." (634 F.2d at 422.) Second, it "[s]erves . . . as a practical measure to facilitate administration of a large nation by the assignment of numerous labors to designated authorities." (*Id.* at 423.)

B. Judge Kennedy Has Advocated a Strong Executive With Some Congressional Check

In a 1980 speech, Judge Kennedy discussed his views on executive power. He said that "the noble but general phrases of the Constitution do not by themselves provide the answers to the question whether the Chief Executive has exceeded the bounds of his constitutional authority." (Salzburg speech, at 3.) He also said that the course of history and modern necessities have dictated that "great powers flow to the President in foreign affairs," (*Id.* at 9), subject to the "authority of Congress to issue corrective instructions in appropriate cases." (*Id.* at 10.) The nominee expanded on this issue in an exchange with Senator Heflin:

> Senator HEFLIN. . . . Would you elaborate on the inherent powers you believe might be exercisable by the President in an emergency?
>
> Judge KENNEDY. . . . *Youngstown Sheet and Tube* [*Co.* v. *Sawyer*, 343 U.S. 579 (1952)] tells us, or it begins to discuss, the critical question, whether or not the President is simply the agent of Congress, bound to do its bidding in all instances, or whether or not there is a core of power that lies at the center of the presidential office that the Congress cannot take away.
>
> As I understand current doctrine, and the *Youngstown* cases, there is that core of power. The extent to which it can be exercised in defiance of the congressional will is a question of abiding concern, I know, to the Congress and to the judges.
>
> . . . [T]hese power zones are perhaps best defined as each branch accommodates the other, and expresses deference to the legitimate concerns of the other branch. (Tr., 12/14/87, at 214–15.)

This deference, in the committee's view, is integral to the proper functioning of the separation of powers doctrine.

C. Judge Kennedy Accepts a Clear Role for the Courts in Resolving Disputes Between the Branches in Appropriate Circumstances

In his *Chadha* opinion, Judge Kennedy sought to strike a balance as to when courts should intervene to resolve disputes between the executive and legislative branches. On the one hand, he noted that "[c]ourts cannot parse every allocation of power under the separation doctrine. We are not the ideal arbiters of efficient administration in many instances because we are not constituted to choose and to apply optimal theories of political and organizational science applicable to the routine operation of Government." (634 F.2d at 424). On the other hand, he recognized that courts must not always abstain from adjudicating interbranch disputes. He stated that where transgressions by one branch of government are blatant, "it is the duty of the judicial branch to resolve disputes with or among the other component parts of the Government." (*Id.* at 422.) When the courts do intervene, wrote Judge Kennedy, they must "interpret separation of powers questions pragmatically, in order to preserve the essential design of the Constitution without imposing unworkable conditions." (*Id.* at 425.)

Based on his testimony, Judge Kennedy appears to believe that each interbranch dispute must be addressed carefully and on its own merits. The following exchange with Senator Byrd illustrates this point:

> Senator BYRD. . . . [D]o you have any problem with Congress being able to get standing . . . [when] there is a serious question that arises between the executive branch and the legislative and the country's national security interests, let's say, are involved?
>
> * * * * *
>
> Judge KENNEDY. . . . [I]n my view it is quite appropriate for the Court to act as an umpire between the political branches of the government. The circumstances in which a case that meets the case or controversy doctrine are ones that we would have to examine in a particular case. I think that in the *Youngstown* case, the steel seizure case, in the *Nixon Tapes* [*United States* v. *Nixon,* 418 U.S. 683 91974)] case, the Court acted completely appropriately in defining and determining the bounds of power between the two political branches. I think that is a completely appropriate role for the Court to play. (Tr., 12/15/87, at 197–98.)

At the same time, Judge Kennedy indicated to Senator Specter that "having to rely on the courts may infer, or may imply an institutional weakness on the part of the Congress that is ultimately debilitating. It seems to me that maybe in some instances Congress is better off standing on its own feet and making its position known, and that its strength in the Federal system will then be greater than if it had relied on the assistance of the courts." (*Id.* at 188.) He added in response to a question from Senator Heflin that "[w]hether or not the courts are the appropriate body for the reconciliation of all of the disputes between the political branches of the

government is a question as to which I have some doubt." (Tr., 12/14/87, at 216; emphasis added.)

IV. JUDGE KENNEDY TESTIFIED THAT THE JUDICIARY HAS GENERALLY PERFORMED WELL IN ITS APPLICATION OF THE ANTITRUST LAWS

Judge Kennedy's testimony on antitrust issues was limited, both because it is not an area of expertise (Tr., 12/14/87, at 111), and because of a pending case on the Supreme Court's docket. (Tr., 12/15/87, at 92.) He did, however, engage in this exchange with Senator Thurmond:

> Senator THURMOND. Judge Kennedy, would you please tell us your general view of the role of antitrust today, including those antitrust issues which you believe most seriously affect competition and the consumer.
>
> Judge KENNEDY. . . . I think it is somewhat reassuring that the judiciary has engaged in a good performance, has shown good performance under the antitrust laws.
>
> The particular elements that are necessary to preserve competition are of course vigorous enforcement of the law against illegal practices, particularly price fixing, and other prohibited practices. (Tr., 12/14/87, at 111–12.)

The nominee also discussed antitrust law with Senator Metzenbaum:

> Senator METZENBAUM. . . . Give me your thoughts, if you will, as to what you think Congress had uppermost in its mind when it enacted the Sherman and Clayton Acts, our basic antitrust statutes, and what are your views on the obligations of the Court to ascertain and enforce congressional intent in this area?
>
> Judge KENNEDY. . . . [T]he concern was, insofar as the acquisitions and merger field, that the capitalistic system simply could not work if there was not an opportunity for small- and medium-sized businesses to invest capital, to have resources and talent in localities throughout the country, and to have some protection against being acquired by large conglomerates. . . . I think it is necessary . . . to recognize that it is a central part of our national policy to have a capitalistic system which is free, which is open. (*Id.* at 96–97.)

As Senator Metzenbaum concluded:

> I would like to leave you with the concerns of this Senator that the antitrust laws are not liberal laws, they are not conservative laws. . . . [W]hen you have those cases before you I would hope that you think seriously about not alone the impact of the consumer, not alone the impact upon the businessperson, not alone the impact of those employees who may or may not be forced out of work by reason of corporate mergers, but you think about the overall impact upon the economic system, the free enterprise system, and recognize that our antitrust laws have served

us well over a period of many years in protecting free competition in this country with many of the attendant benefits that have resulted in the system. (Tr., 12/15/87, at 101.)

PART SIX: JUDGE KENNEDY TESTIFIED THAT HE MADE NO COMMITMENTS TO THE ADMINISTRATION OR TO ANY OTHER PARTY IN CONNECTION WITH HIS NOMINATION OR CONFIRMATION

Under questioning by Chairman Biden, Judge Kennedy testified that he made no commitments to the Administration or to any other party in connection with either his nomination or confirmation. With respect to an October 28, 1987 meeting among Judge Kennedy and officials of the White House and Justice Department, for example, the following exchange took place:

> The CHAIRMAN. . . . Were you asked at that meeting how you would rule on any legal issue?
>
> Judge KENNEDY. I was not, and I was asked no question which came even close to the zone of what I would consider infringing on judicial independence.
>
> I was asked no question which even came close to the zone of what I would consider improper. I was asked no question which came even close to the zone of eliciting a volunteered comment from me as to how I would rule on any particular case, or on any pending issue.
>
> The CHAIRMAN. Judge, were you asked about your personal opinion on any controversial issue?
>
> Judge KENNEDY. I was not.
>
> The CHAIRMAN. Did anyone ask you what, as a personal matter, you thought of any issue or case?
>
> Judge KENNEDY. No such questions were asked, and I volunteered no such comments.
>
> The CHAIRMAN. And were you asked anything about cases currently before the Court?
>
> Judge KENNEDY. No, sir. (Tr., 12/14/87, at 100.)

Chairman Biden also asked about meetings subsequent to the President's announcement of Judge Kennedy's selection:

> The CHAIRMAN. Now I would like to speak with you about the same issues, subsequent to the President . . . announcing . . . that you were going to be his nominee.
>
> Have you made any commitments or promises to anyone in order to obtain their support for your nomination?
>
> Judge KENNEDY. I have not done so, and I would consider it highly improper to do so.
>
> The CHAIRMAN. So just to make the record clear, you made no promise to any member of the Senate on anything?
>
> Judge KENNEDY. Other than that I would be frank and candid in my answers. (*Id.* at 101–02.)

Finally, Chairman Biden inquired about a newspaper column that recounted a meeting between Judge Kennedy and Senator Helms, in which Judge Kennedy was reported to have given some signal about his views on abortion. Judge Kennedy indicated that the column was incorrect (*Id.* at 105), and stated:

> . . . I think it is important to say that if I had an undisclosed intention, or a fixed view, on a particular case, an absolutely concluded position on a particular case or a particular issue, perhaps I might be obligated to disclose that to you.
>
> I do not have any such views with reference to privacy, or abortion, or the other subjects there mentioned [in the column], and therefore, I was not attempting, and would not attempt to try to signal, by inference, or by indirection, my views on those subjects. (*Id.* at 103–04.)

As Senator Metzenbaum said with respect to the column: "We certainly know that Judge Kennedy specifically disavowed the facts as claimed in that article. . . . And he was very categorical and very unequivocal in saying it just did not happen that way." (Tr., 12/16/87, at 199.)

CONCLUSION

Under Article II of the Constitution, the President has the right to name justices to the Supreme Court—with the "advice and consent" of the Senate. Since Justice Powell resigned in June 1987, this committee has held hearings on two nominees. During each set of hearings, the committee examined the nominee's judicial philosophy and approach to interpreting the Constitution. It has in each occasion probed the nominee's views on the Constitution's fundamental law, his commitment to our constitutional scheme and his vision of the Supreme Court's role in interpreting the supreme law of the land. That examination, as the committee's vote on the two nominees makes unequivocally clear, does not necessarily guarantee a particular outcome. Rather, it is the means through which the committee develops the record on which the Senate exercises its constitutional duty of advice and consent.

The committee has concluded that Judge Kennedy's judicial philosophy and approach to constitutional interpretation is consistent with the history and tradition of this Nation and of the Supreme Court. The nominee's testimony established that he respects a continuous evolution of constitutional doctrine. His vision of constitutional interpretation seems to invoke Justice Holmes's reminder that cases "must be considered in the light of our whole experience and not merely in that of what was said [two] hundred years ago." (*Missouri* v. *Holland,* 252 U.S. 416, 433 (1920).) Indeed, Judge Kennedy does not insist on certitudes where none exist or on simple keys to unlock constitutional meaning; rather, he accepts both the built-in ambiguities of the Constitution—"spacious phrases," in Judge Kennedy's terms—and the role of the courts in trying to resolve them. And the courts are to fulfill this task, in his view, with the benefits of history and experience and with the accumulated wisdom of those who have confronted the challenges of times past.

Characteristic of Judge Kennedy's approach is his view on liberty under the Constitution. He recognizes a tradition of liberty and privacy—a tradition that creates a zone of protection against unwarranted governmental intrusion into intimate family matters, such as the right to marital privacy. And he embraces the view, as he put it, that "the American people do have a shared vision. . . . I think important in that shared vision is the idea that each man and woman has the freedom and the capacity to develop to his or her own potential." (Tr., 12/15/87, at 49.)

The committee is not without its concerns about Judge Kennedy, particularly in the area of civil rights protection for women and minorities. These concerns arise from several of Judge Kennedy's opinions. But none of these opinions suggest an agenda to diminish the role of the Federal courts in protecting individual rights. Furthermore, the nominee's testimony demonstrated that his views on civil rights issues have evolved and developed over time, as he has become more sensitive to the conditions under which some in our society have labored. Several witnesses attested to this evolution and to Judge Kennedy's open-mindedness, and to the fact that his development process is continuing. He is a grown man who will grow more, said Nathaniel Colley. And as Dean Praeger concluded:

> Because Anthony Kennedy is both open to discussion and open-minded, I am sure that the concerns expressed during these hearings will be taken in and reflected upon by him over a long period of years. . . . [He is] genuinely open, . . . [he] loves the study of law but also has a real world sense of the impact of the law on individual people, and . . . [he] is deeply concerned about fairness. . . . (Praeger written statement, at 2.)

The transition from circuit court judge to Supreme Court justice is one, in Michael Martinez's words, "from follower to leader." (Tr., 12/16/87, at 270.) It is a transition from following precedents to setting precedents, from reacting to history to charting a course of history. And, at this particular time in history, with the Supreme Court closely divided on many of the critical issues of the day, it is a transition with great significance. In the view of the committee, Judge Kennedy's record and views expressed at the hearings warrant that the Senate confirm his nomination to the Supreme Court.

VIEWS OF MESSRS.

JOSEPH R. BIDEN, Jr.
EDWARD M. KENNEDY.
ROBERT C. BYRD.
HOWARD M. METZENBAUM.
DENNIS DECONCINI.
PATRICK J. LEAHY.
HOWELL HEFLIN.
PAUL SIMON.
ARLEN SPECTER.

ADDITIONAL VIEWS

ADDITIONAL VIEWS OF MESSRS. THURMOND, HATCH, SIMPSON, GRASSLEY, SPECTER, AND HUMPHREY REGARDING THE NOMINATION OF JUDGE ANTHONY M. KENNEDY, TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

The committee's confirmation hearings and investigation of the views of Judge Kennedy have established that Judge Kennedy is one of the leading practitioners of judicial restraint in the Federal judiciary. There is no higher qualification for a seat on the Supreme Court. Although the committee's report notes that "Judge Kennedy is a genuine advocate of judicial restraint," this conclusion and the report's supporting analysis belie the importance of judicial restraint and Judge Kennedy's rigorous and laudable adherence to the principle.

As a member of the Supreme Court Judge Kennedy would interpret the law, not make it. He believes that the role of the judge in our democratic society is faithfully to apply the law as established under the Constitution and as enacted by the people's elected representatives, not to substitute his own personal preferences as to desirable social policy. Judge Kennedy's philosophy of judicial restraint is amply demonstrated in the more than 400 opinions he has authored on the U.S. Court of Appeals for the Ninth Circuit over the past 12 years.

A. Deciding Cases on Narrowest Grounds

It is a primary tenet of judicial restraint that judges should decide only the issues in a case that must be decided in order to resolve the case. Issues not vital to resolution of the case must be left for another day. Judge Kennedy repeatedly has demonstrated his stalwart adherence to this tenet of judicial restraint. When Judge Kennedy decides a case, he narrows the scope of the issues involved and the rule of law that he announces, rather than reaching out to decide issues or cases that are not directly before him. Rather than draw larger conclusions and reach decisions that affect persons not actually before the court, Judge Kennedy's general approach to judging is to focus on the specific issues presented and avoid constitutional issues where possible.

For example, in *U.S.* v. *Boatwright,* 822 F.2d 862 (9th Cir. 1987), Judge Kennedy's opinion for a unanimous panel reversed a defendant's conviction but declined to give the exclusionary rule the broad reading urged by the parties. Noting that such a reading would go beyond that required by relevant binding precedent,

Judge Kennedy formulated a narrower rule for the case at hand—a rule that would prevent evidence of criminal activity from being excluded unnecessarily in other cases. Also, when he joins another judge's opinion, Judge Kennedy may write a separate concurring opinion to emphasize that the main opinion should not be cited as precedent in the future for some broad principle of law. *See Cabral-Avila* v. *INS,* 589 F.2d 957 (9th Circ. 1978) (Kennedy, J., concurring) (emphasizing that majority opinion should not be taken to hold that exclusionary rule applies to immigration deportation proceedings). Judge Kennedy emphasized the importance of narrowing his judicial opinions when at the committee hearings, he said that "I think that the constitutional doctrine that is announced should be no broader than necessary to decide the case at hand."

B. Second-Guessing Legislative Policy Decisions

Judges are not legislators. Judges are called on to interpret the law, not make it. Indeed, in his speech to the Canadian Institute for Advanced Legal Studies at Stanford University in the summer of 1986, Judge Kennedy said that "If courts adjudicate claims by premises that are essentially political, they forfeit their right to independence, to the respect due a neutral arbiter, and to lifetime tenure." Judge Kennedy understands that the crafting of laws is a legislative function and that the courts have no business rewriting those laws. In deciding any case concerning a statute, Judge Kennedy recognizes that he is bound by the language that Congress enacted into law. Thus, in a case applying the Racketeer Influenced and Corrupt Organizations Act (RICO), a law primarily designed to attack organized crime, to a business fraud case, the Judge wrote: "It is most unlikely that Congress envisaged use of the RICO statute in a case such as the one before us, but we are required to follow where the words of the statute lead." *Schreiber Distributing Co.* v. *Serv-well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986) (Kennedy, J., concurring). Further evidence of Judge Kennedy's position that law is to be made in the first instance by the legislature is his belief that poorly drafted statutes should be remedied by the Congress rather than by the courts. *See United States* v. *Bell*, 742 F.2d 509 (9th Cir. 1984).

Judge Kennedy also refused to assume the role of a legislator and make new law in the area of comparable worth. He authored a unanimous panel opinion that reversed a finding of sex discrimination against the State of Washington based on a "comparable worth" theory. While observing that "the Washington legislature may have the discretion to enact a comparable worth plan if it chooses to do so," he held that title VII of the Civil Rights Act did not support a court-imposed comparable worth remedy. *AFSCME* v. *State of Washington*, 770 F.2d 1401 (9th Cir. 1985).

At the committee's hearings Judge Kennedy reiterated his rejection of a judicial approach that would permit courts to second-guess legislative policy decisions. Judge Kennedy said that "If a law is wrong-headed, or a bad, or an ill-conceived law, but is nevertheless constitutional, the court has no choice but to enforce it." The Judge also said that ". . . judges who are appointed for life cannot use

the judiciary as a platform for their own particular views," and that "I think there is concern in society that the courts sometimes reach results simply because the courts think in their own view that those results are right, and I think it is extremely important for judges to remember that they are not political officers in black robes."

C. Allocating Government Power

As a practitioner of judicial restraint, Judge Kennedy has vigorously enforced provisions of the Constitution that allocate governmental powers and protect individual rights. In one of the most important constitutional cases of our time, *Chadha* v. *INS*, 634 F.2d 408 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983), Judge Kennedy held a provision authorizing a one-house legislative veto to be invalid. In so doing, the Judge restricted his search for the Constitution's meaning to the text and the structure of the document itself, rather than incorporating his own or someone else's notions of "good government." His decision in the case was affirmed in a landmark ruling of the Supreme Court.

Judge Kennedy's decisions also reflect due regard for the role of the States in our Federal system and the value of federalism. For instance, dissenting in *Ostrofe* v. *Crocker*, 670 F.2d 1379 (9th Cir. 1982) (Kennedy, J., dissenting), he argued that the law of wrongful discharge was a matter of State concern and that Federal antitrust laws were not intended to supersede State regulation to employer-employee relations.

Judge Kennedy's adherence to the principle of judicial restraint is grounded in his understanding of the potential power of Federal judges in our constitutional system. He has stated: "Judicial power without rational restraints is simply the exercise of raw will, the arrogance of power, abuse of office." At the committee's hearings, Judge Kennedy explained what judicial power without restraints would lead to: "The unrestrained exercise of judicial power is to declare laws unconstitutional merely because of a disagreement with their wisdom.

One of the most important aspects of judicial restraint, and, indeed, of being a judge, is putting aside one's personal choices and adhering to the law alone. This can be difficult, especially in controversial constitutional cases. Judge Kennedy has explicitly recognized his responsibilities in this regard. Judge Kennedy said that, "The judge must constantly be on guard against letting his or her biases or prejudices or affections enter into the judicial process."

In summary, Judge Kennedy's demonstrated adherence to judicial restraint makes him highly qualified for elevation to the Supreme Court. The practice of judicial restraint among our Nation's Federal judges insures that the structure and design of our National Government, as brilliantly conceived by the framers, will be preserved, and the rights and liberties of individual Americans will be protected. Judge Kennedy will join a long line of respected Supreme Court Justices—among them Holmes, Frankfurter, Harlan, and others—who have sounded the call for judicial restraint. As a member of the Supreme Court, Judge Kennedy will provide a new voice and new impetus for this compelling principle.

ADDITIONAL VIEWS OF MR. ORRIN G. HATCH

After more than 7 months of deliberations in an effort to fill the vacant Supreme Court seat, the explanations of the majority report fail to reflect a sound historical or jurisprudential picture of the reasons that Judge Kennedy will be and should be confirmed as an Associate Justice of the Supreme Court. Rather than dwell on the distortions and inaccuracies of this report, however, I prefer to focus on the merits of the individual chosen to succeed Justice Powell on our Nation's highest court.

Accordingly, I am honored to express my approval for an individual who is eminently qualified to serve in the highest judicial office of our land. Fourteen years as a practicing attorney, 20 years as a professor of constitutional law, and more than 12 years on the circuit court that defines Federal law for 9 States and 37 million people have prepared Judge Anthony Kennedy well for the trust placed in him by President Ronald Reagan. I have no doubt that in coming decades this nomination may be counted as among the most significant actions taken by President Reagan in his two terms at our Nation's helm.

I express this confidence because Judge Kennedy has exhibited the kind of courage that is the hallmark of a great Supreme Court justice. While on the ninth circuit, Judge Kennedy had the courage to refuse to enforce Federal statutes which failed to comply with the terms of the Constitution. For example, he invalidated legislative veto provisions in the *Chadha* decision.

This kind of courage will again be required of Judge Kennedy. Even while his nomination was pending, a circuit court in the District of Columbia invalidated the independent counsel law because it violated the separation of powers in the Constitution. I do not presume to know how Judge Kennedy might vote or even if he will be called upon to review that particular law, but I am confident that he possesses the ability and courage to decide whether Federal laws overstep the bounds of the Constitution.

Even more important than the courage to undertake that task, however, is a judge's wisdom and restraint. Judge Kennedy will no doubt become a respected Justice because he will base his decisions on the Constitution and the laws of the Nation. He does not have any political agenda and will not attempt to write his own preferences into law.

Some legal scholars and even some Senators have contended that judges need not base their decisions on the words of the Constitution. Instead they contend that judges are not worthy of service on the Supreme Court unless they are willing to reach outside the Constitution to protect human dignity or some other vague and undefined principle. The problem with this notion is that it permits unelected judges to override the democratic laws created by the people without constitutional justification. For example, judges

have overturned the capital punishment laws of 34 States even though the Constitution itself mentions the death penalty. This is known generally as judicial activism. In my mind, judges who take upon themselves to overrule the people's laws without clear warrant from the Constitution overstep their authority. Judge Kennedy's years of service on the ninth circuit and his testimony before this committee indicate clearly that he is not this kind of judge.

As he stated, he will practice judicial restraint, which is another way of saying he will refrain from using extraconstitutional principles to decide cases. This is the task of judges—to read the Constitution and to apply it to the facts of specific cases. A judge who reads things into the Constitution is not really acting as a judge, but as a politician in robes.

I recall what Judge Kennedy stated in a speech a year before his nomination: "The imperatives of judicial restraint spring from the Constitution itself, not from a particular judicial theory. . . . The consitutional text and its immediate implications, traceable by some historical link to the ideas of the Framers, must govern judges." Judge Kennedy's profound respect for the Constitution is his best qualification to serve on the Supreme Court.

To those who classify judges who practice judicial restraint as conservative, he has the best response. As he states, judicial restraint is neither conservative nor liberal, but a requirement of the Constitution and a natural predicate for the doctrine of judicial review.

Judge Kennedy will be a champion of judicial restraint, like Justices Harlan, Frankfurter, Burger, Stewart, Powell, and many others before him. It is easy to understand why he has won President Reagan's trust. And it is easy to understand why he will win the trust of the American people as well. After all, he will let the people govern themselves, rather than presuming that he knows better than the people what rights and values deserve judicial enforcement.

I could say many more laudatory things, but perhaps the highest compliment a judge can receive is that he knows that ours is a government of laws, not of men. Judge Kennedy deserves that compliment and more. He will serve to remind other judges of their duty to uphold the Constitution as written.

I look forward to Judge Kennedy's final confirmation and to watching his years of service to our Nation.

SUPPLEMENTAL VIEWS OF MESSRS. HUMPHREY AND GRASSLEY

While we join the committee in supporting the confirmation of Judge Kennedy, we disassociate ourselves from the material in the Committee Report which reflects the same distorted approach to constitutional issues and the confirmation process that resulted in the unjust and unwise rejection of Judge Bork's nomination. The main report also sets forth a selective depiction of Judge Kennedy's record and testimony to conform his image to the skewed standards and litmus tests imposed on Judge Bork. This is not only inaccurate, but attempts to reenforce and institutionalize the invalid standards for confirmation applied to Judge Bork.

Additionally, Judge Kennedy's testimony before the committee raised some concerns for us regarding his approach to several significant areas of constitutional law. We therefore consider it important to submit this statement of additional views.

I.

We agree with the committee's conclusion that Judge Kennedy is highly qualified in terms of professional competence, integrity, and judicial temperament for appointment to the Supreme Court. His accomplishments as a practicing attorney, a law professor, and an outstanding court of appeals judge demonstrate a sound understanding of the law, strong analytical ability, and an exemplary sense of fairness and decency which should serve him well on the High Court. His professional and personal integrity appear beyond reproach.

Further, Judge Kennedy demonstrates an admirable sense of humility which is sometimes lacking among jurists and lawyers of comparable or lesser accomplishments. We believe that this sense of humility will serve Judge Kennedy—and the Nation—well when he is presented with cases and arguments tempting the Court to exceed the proper limits of the judicial role.

II.

In addition to Judge Kennedy's excellent qualifications and his manifest intergrity, we believe his testimony and the whole record show that he has fundamental respect for the Constitution and for the necessary limitations of the judicial function. We have no reason to believe that he will follow the lead of some other justices and judges who superimpose their personal value systems and ideologies on the process of adjudication.

These are the prerequisites we look for in deciding whether to support confirmation to the Supreme Court. Therefore, although we have reservations and concerns about Judge Kennedy's testimony in several important areas, we support his confirmation.

III.

Although Judge Kennedy warrants confirmation, we would not want the record to show that certain views he expressed at his confirmation hearings were considered commendable and sound by all members of the committee. Several of the positions he expressed were disturbing to us.

1. Subjective Notions of Privacy as Constitutional Right

During the Bork hearings, many Senators stated that their primary objection to the nominee was his refusal to endorse the generalized constitutional right of privacy announced by Justice Douglas in the case of *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). One Senator flatly announced on the Senate floor that he would not vote to confirm **any** nominee for the Court who did not accept this generalized right of privacy (*Congressional Record,* Oct. 9, 1987, p. S.14012, remarks of Senator Moynihan).

Nowhere mentioned in the text of the Constitution, this undefined and standardless "right" was said by Justice Douglas to derive from the "penumbras" and "emanations" of explicit provisions in the Bill of Rights, such as the fourth amendment. This formulation is hardly a model of constitutional precision, and allows courts enormous leeway to expand the amorphous privacy right to virtually any area of human activity which a judge feels should be protected.

Since *Griswold,* the Supreme Court has generally refrained from utilizing or expanding this generalized privacy right, with one momentous exception. In *Roe* v. *Wade,* 410 U.S. 113 (1973), the Court invoked the general principle of the *Griswold* decision to justify a constitutional right to abortion under certain circumstances. The *Roe* decision was rationalized under the liberty component of the 14th amendment due process clause rather than Justice Douglas's "penumbral" theory, but the decision's operating principle was the same generalized right of privacy.

Since *Griswold* and *Roe,* the composition of the Court has changed and even greater division has developed over the legitimacy of the principle motivating those decisions. In subsequent abortion decisions, such as *City of Akron* v. *Akron Center for Reproductive Health,* 462 U.S. 416, 452 (1983), and *Thornburg* v. *American College of Obstetricians,* 106 S.Ct. 2169, 2216 (1986), three members of the Court have vigorously dissented against applying those principles to limit regulation of abortion. And in *Bowers* v. *Hardwick,* 106 S.Ct. 248 (1986), a majority of the Court explicitly rejected the privacy right as a basis for invalidating state laws prohibiting homosexual sodomy.

It is evident that four members of the current Supreme Court—Justices Rehnquist, White, O'Connor, and Scalia—either reject outright or sharply question the constitutional privacy doctrine announced in *Griswold* and expanded in *Roe* and subsequent abortion decisions.

Against this background, Judge Kennedy was subjected to the same "litmus test" on the privacy issue that proved the undoing of Judge Bork. Although Judge Kennedy properly declined to make any explicit commitments in this area, he repeatedly stated his ac-

ceptance of an unenumerated constitutional privacy right, which he would apparently apply as part of the liberty component of the due process clause. He testified that the due process clause "includes protection of a value that we call privacy" (Hrg. Tr. p. 98) and that it "protects the values of privacy that Americans legitimately think are part of their Constitutional heritage." (Id., p. 42.)

Although these observations have a nice ring to them, they offer no objective standards or "neutral principles" which would limit judicial discretion in applying them. Ask any 10 Americans—or any 10 judges—what "values of privacy" they think are part of their "Constitutional heritage" and you will get 10 different answers. Several of the law professors who testified against Judge Bork have asserted that the right to engage in prostitution or the private use of illegal drugs are part of that constitutional heritage. *See, e.g.,* D. Richards, *Sex, Drugs, Death, and the Law,* pp. 157, 186–87 (Professor Richards asserts, for example, that private use of illegal drugs is "an aspect of personal dignity that is worthy of protection under the constitutional right to privacy". *Id.* at p. 187). We have no doubt that Madison and Hamilton would be surprised, to say the least, to learn that such was the constitutional heritage they had left us.

When Senator Humphrey asked Judge Kennedy to explain the standards he would use to limit the scope of this constitutionally protected privacy value, his answer was not reassuring. He cited such notions as the "right to human dignity" and the "inability of a person to manifest his or her own personality." In fairness, he later stressed that these were merely the kind of factors he would use in trying to square the claim with the Constitution, and that any such claims would have to be balanced against the many strong and legitimate interests of the Government (Hrg. Tr. p. 204).

Nonetheless, Judge Kennedy's readiness to endorse the legitimacy of the inherently subjective and standardless privacy doctrine is troubling. As noted below, Judge Kennedy declined to endorse at least one basic constitutional precedent (i.e., that capital punishment is not per se unconstitutional) which is far more well-established and longstanding than the *Griswold*-based privacy right. We can only hope that Judge Kennedy is as willing to reconsider the legitimacy of the unenumerated privacy rights doctrine as he implied he is with respect to the well-settled constitutionality of the death penalty. And when he does have occasion to examine the scope of the *Griswold* doctrine, we hope that he will see fit to study the views of Robert Bork on that issue, just as he studied the views of Laurence Tribe when he wrote his privacy rights opinion in *Beller* v. *Middendorf,* 632 F.2d 788, 809 (9th Cir. 1980) (citing Prof. Tribe).

2. Basic Constitutionality of Death Penalty

In contrast to his willingness to endorse the controversial doctrine of unenumerated constitutional privacy rights, Judge Kennedy was unwilling to recognize the basic and long-settled precedent that the death penalty itself is not unconstitutional.

Senators Heflin, Byrd, and Humphrey all asked Judge Kennedy about his views on the basic constitutionality of the death penalty.

In each case, his answer was essentially the same. As he stated to Senator Heflin, "I . . . would like to underscore that I have not committed myself as to the constitutionality of the death penalty. I have committed that if it is found to be constitutional, it should be enforced." (Hrg. Tr. p. 213.) When Senator Humphrey pressed him further on the issue, and pointed out that the Supreme Court has **never** held that the death penalty is per se unconstitutional, Judge Kennedy responded:

> Well, I guess we have a disagreement as to whether or not it is well-settled, Senator. These decisions are very close. Some justices have indicated that it is unconstitutional, and I simply think that I should not take a specific position on a constitutional debate of ongoing dimension. (Hrg. Tr. pp. 207–08.)

The most disturbing aspect of this testimony is its stark contrast with the approach Judge Kennedy took towards questions regarding the *Griswold*-based privacy right. If Judge Kennedy felt that he should not take a position "on a constitutional debate of ongoing dimension", then consistency would demand that he decline to commit himself on the sharply-debated question of unenumerated privacy rights. That doctrine is of relatively recent judicial origin, and is sharply questioned in varying degrees by half the members of the current Supreme Court. Yet Judge Kennedy considered it appropriate—or perhaps necessary—to affirm his recognition of this generalized right.

In contrast, the availability of the dealth penalty as a constitutional criminal sanction has been recognized in an unbroken line of cases over 200 years of American history—as indeed it is recognized repeatedly in the text of the Constitution itself. Even in the sharply-divided 1972 Supreme Court ruling in *Furman* v. *Georgia,* 408 U.S. 238 (1972), only two members of the Court opined that the death penalty is per se unconstitutional. Since *Furman,* the Court has consistently and repeatedly upheld the fundamental constitutionality of the death penalty. *See e.g., Gregg* v. *Georgia,* 428 U.S. 153 (1976); *Jurek* v. *Texas,* 428 U.S. 262 (1976); *Pulley* v. *Harris,* 465 U.S. 37 (1984); *Zant* v. *Stephens,* 462 U.S. 862 (1983); *McCleskey* v. *Kemp,* 107 S.Ct. 1756 (1987).

Only two members of the current Court—Justices Brennan and Marshall—have ever supported the position that the death penalty is per se unconstitutional. If any position on a fundamental issue is "outside the mainstream" of constitutional jurisprudence, it is the Brennan/Marshall position on capital punishment. If Judge Kennedy genuinely believes that this issue is not well-settled, his notions of precedent and stare decisis (not to mention basic respect for the clear text of the Constitution and the *indisputable* intent of the framers on this issue) are troublesome.

However, we are satisfied that Judge Kennedy's reticence on the death penalty reflected understandable caution on a highly-charged issue rather than genuine doubts about the basic constitutionality of the death penalty. The confirmation standards of the current Senate seem to demand acceptance of certain Constitutional doctrines (such as the unenumerated rights doctrine) while encouraging a prudent silence on others. On reflection, we think this phenomenon says more about our confirmation process than it does about Judge Kennedy.

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